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NORTH CAROLINA REPORTS.

VOL. 135.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

[V. 135]

SPRING TERM, 1904.

BY

ZEB V. WALSER,

STATE REPORTER.

(VOL. IX.)

RALEIGH:
E. M. UZZELL & CO., STATE PRINTERS AND BINDERS.
1904.

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OF THE

SUPREME COURT OF NORTH CAROLINA,

SPRING TERM, 1904.

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

WALTER A. MONTGOMERY, PLATT D. WALKER,
ROBERT M. DOUGLAS, HENRY G. CONNOR.

ATTORNEY-GENERAL:

ROBERT D. GILMER.

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ZEB V. WALSER.

CLERK OF THE SUPREME COURT:

THOS. S. KENAN.

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA.

Name.	*District.*	*County.*
George H. Brown	First	Beaufort.
Robert B. Peebles	Second	Northampton.
Henry R. Bryan	Third	Craven.
Charles M. Cooke	Fourth	Franklin.
Oliver H. Allen	Fifth	Lenoir.
William R. Allen	Sixth	Wayne.
T. A. McNeill	Seventh	Robeson.
Walter H. Neal	Eighth	Scotland.
Thomas J. Shaw	Ninth	Guilford.
Benjamin F. Long	Tenth	Iredell.
Erastus B. Jones	Eleventh	Forsyth.
William A. Hoke	Twelfth	Lincoln.
W. B. Councill	Thirteenth	Watauga.
M. H. Justice	Fourteenth	Rutherford.
Frederick Moore	Fifteenth	Buncombe.
Garland S. Ferguson	Sixteenth	Haywood.

SOLICITORS.

Name.	*District.*	*County.*
George W. Ward	First	Pasquotank.
Walter E. Daniel	Second	Halifax.
L. I. Moore	Third	Pitt.
Charles C. Daniels	Fourth	Wilson.
Rodolph Duffy	Fifth	New Hanover.
Armistead Jones	Sixth	Wake.
C. C. Lyon	Seventh	Bladen.
L. D. Robinson	Eighth	Anson.
Aubry L. Brooks	Ninth	Guilford.
William C. Hammer	Tenth	Randolph.
S. P. Graves	Eleventh	Surry.
James L. Webb	Twelfth	Cleveland.
Moses N. Harshaw	Thirteenth	Caldwell.
J. F. Spainhour	Fourteenth	Burke.
Mark W. Brown	Fifteenth	Buncombe.
Thad. D. Bryson	Sixteenth	Swain.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL OF 1904 AND SPRING OF 1905.

SUPREME COURT.

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place on the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Fall Term, 1904.		Spring Term, 1905.	
First District	August	30.	February	7.
Second District	September	6.	February	14.
Third District	September	13.	February	21.
Fourth District	September	20.	February	28.
Fifth District	September	27.	March	7.
Sixth District	October	4.	March	14.
Seventh District	October	11.	March	21.
Eighth District	October	18.	March	28.
Ninth District	October	25.	April	4.
Tenth District	November	1.	April	11.
Eleventh District	November	8.	April	18.
Twelfth District	November	15.	April	25.
Thirteenth District	November	22.	May	2.
Fourteenth District	November	29.	May	9.
Fifteenth District	December	6.	May	16.
Sixteenth District	December	13.	May	23.

SUPERIOR COURTS.

Spring Terms date from January 1st to June 30th.
Fall Terms date from July 1st to December 31st.

(The parenthesis numeral following the date of a term indicates the number of weeks during which the court may hold).

FIRST JUDICIAL DISTRICT.

FALL TERM, 1904—Judge E. B. Jones.
SPRING TERM, 1905—Judge B. F. Long.

Currituck—Sept. 5 (1); Feb. 27 (1).
Camden—Sept. 12 (1); Mar. 6 (1).
Pasquotank—Sept. 19 (1); Nov. 28 (1); Mar. 13 (2); May 29 (2).
Perquimans—Sept. 26 (1); Mar. 27 (1).
Chowan—Oct. 3 (1); April 3 (1).
Gates—Oct. 10 (1); April 10 (1).
Beaufort—†Oct. 17 (2); Dec. 5 (3); Feb. 13 (2); †April 17 (1); *May 15 (1).
Washington—Oct. 31 (1); April 24 (1).
Tyrrell—Nov. 7 (1); May 1 (1).
Dare—Nov. 14 (1); May 22 (1).
Hyde—Nov. 21 (1); May 8 (1).

SECOND JUDICIAL DISTRICT.

FALL TERM, 1904—Judge W. A. Hoke.
SPRING TERM, 1905—Judge E. B. Jones.

Northampton—‡Aug. 1 (1); Oct. 31 (2); ‡Jan. 23 (1); Mar. 27 (2).
Hertford—*Aug. 15 (1); Oct. 24 (1); Feb. 27 (1); April 24 (1).
Halifax—Aug. 22 (2); Nov. 28 (2); *Jan. 30 (1); Mar. 6 (2); June 5 (2).
Bertie—‡Sept. 12 (1); Nov. 14 (2); ‡Feb. 20 (1); May 1 (2).
Warren—Sept. 19 (2); Feb. 13 (1); June 19 (1).

THIRD JUDICIAL DISTRICT.

FALL TERM, 1904—Judge W. B. Councill.
SPRING TERM, 1905—Judge W. A. Hoke.

Greene—Sept. 5 (1); Dec. 5 (2); Feb. (1).
Pitt—Sept. 19 (1); †Nov. 7 (2); Jan. 16 (2); †Mar. 20 (2); April 24 (2).
Craven—Oct. 3 (2); Nov. 21 (2); †Feb. 13 (1); *April 10 (1); †May 8 (2).
Carteret—Oct. 17 (1); Mar. 13 (1).
Pamlico—Oct. 24 (1); April 17 (1).
Jones—Oct. 31 (1); April 3 (1).

FOURTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge M. H. Justice.
SPRING TERM, 1905—Judge W. B. Councill.

Nash—Aug. 29 (1); Nov. 28 (2); Mar. 13 (1); May 1 (2).
Wilson—*Sept. 5 (1); †Nov. 14 (2); *Dec. 12 (1); Feb. 6 (2); May 15 (1).
Edgecombe—Sept. 12 (1); †Oct. 31 (2); Mar. 6 (1); †April 3 (2).
Martin—Sept. 19 (2); Mar. 20 (2).
Vance—Oct. 3 (2); Feb. 20 (2); May 22 (1).
Franklin—Oct. 17 (2); Jan. 23 (2); April 17 (2).

FIFTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge Frederick Moore.
SPRING TERM, 1905—Judge M. H. Justice.

Duplin—Aug. 29 (1); Oct. 31 (2); Jan. 16 (1); Mar. 13 (1).
Pender—Sept. 5 (1); Jan. 9 (1); Feb. 27 (1).
Lenoir—Sept. 12 (2); Nov. 14 (2); Mar. 20 (2); June 12 (2).
New Hanover—Sept. 26 (1); Oct. 17 (2); Nov. 28 (1); Jan. 23 (1); Jan. 30, (2); April 3 (1); April 10 (2); May 29 (1); June 26 (1).
Sampson—Oct. 3 (2); Feb. 13 (2); May 1 (2).
Onslow—Dec. 5 (2); April 24 (1).

SIXTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge G. S. Ferguson.
SPRING TERM, 1905—Judge Frederick Moore.

Harnett—Aug. 29 (1); Nov. 14 (2); Feb. 6 (2); May 22 (1).
Johnston—Sept. 5 (1); Nov. 28 (2); Mar. 13 (2).
Wayne—Sept. 12 (2); Jan. 23 (2); April 17 (1).
Wake—July 11 (2); Sept. 26 (2); †Oct. 24 (3); Jan. 9 (2); †Feb. 27 (2); Mar. 27 (2); †April 24 (3).

SEVENTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge G. H. Brown.
SPRING TERM, 1905—Judge G. S. Ferguson.

Robeson—*July 25 (1) †Sept. 12 (2); *Nov. 7 (2); †Dec. 5 (1); *Feb. 6 (2); †April 3 (2); †May 22 (1).
Cumberland—*Aug. 29 (1); †Oct. 24 (2); *Nov. 21 (1); *Jan. 16 (1); ‡Feb. 20 (1); †Mar. 27 (1); May 1 (3).
Columbus—Sept. 5 (1); Nov. 28 (1); Feb. 27 (1); April 17 (2).
Brunswick—Sept. 26 (1); Mar. 20 (1).
Bladen—Oct. 10 (2); March 6 (2).

EIGHTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge R. B. Peebles.
SPRING TERM, 1905—Judge G. H. Brown.

Union—*Aug. 1 (1); †Aug. 22 (2); *Oct. 31 (2); *Jan. 16 (2); †Feb. 20 (2); *Mar. 20 (1).
Chatham—†Aug. 8 (1); Nov. 14 (1); Feb. 6 (1); May 8 (1).
Moore—*Aug. 15 (1); ‡Sept. 19 (1); *Nov. 21 (1); †Jan. 23 (2); *April 24 (1); †May 15 (2).
Richmond—*Sept. 5 (1); Sept. 26 (2); *Mar. 6 (1); †April 3 (2).
Anson—*Sept. 12 (1); †Oct. 10 (2); *Feb. 13 (1); †April 10 (1); †May 29 (1).
Scotland—†Oct. 24 (1); *Nov. 28 (1); †Mar. 13 (1); *May 1 (1).

NINTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge H. R. Bryan.
SPRING TERM, 1905—Judge R. B. Peebles.

Granville—Aug. 1 (1); Nov. 21 (2); Feb. 6 (1); April 24 (2).
Orange—Aug. 8 (1); Oct. 17 (1); Mar. 13 (1); †May 22 (1).
Person—Aug. 15 (1); Nov. 14 (1); April 10 (1); †June 5 (1).
Guilford—*Aug. 22 (1); †Sept. 19 (2); *Oct. 24 (1); †Oct. 31 (1); †Dec. 12 (2); *Jan. 16 (1); †Feb. 13 (2); †April 17 (1); *May 8 (1); †June 12 (2).
Durham—*Aug. 29 (1); †Oct. 3 (2); *Dec. 5 (1); *Jan. 9 (1); †Jan. 23 (2); †Mar. 20 (2); *May 15 (1).
Alamance—†Sept. 5 (2); *Nov. 7 (1); Feb. 27 (2); †May 29 (1).

TENTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge C. M. Cooke.
SPRING TERM, 1905—Judge H. R. Bryan.

Stanly—*July 18 (1); †Sept. 19 (1); *Dec. 19 (1); †Mar. 13 (1).
Randolph—July 25 (2); Dec. 5 (1); Mar. 20 (2).
Iredell—Aug. 8 (2); Nov. 7 (2); Jan. 30 (2); May 22 (2).
Davidson—Aug. 22 (2); Feb. 27 (2); †April 24 (1).
Rowan—Sept. 5 (2); Nov. 21 (2); Feb. 13 (2); May 8 (2).
Montgomery—Sept. 26 (2); *Jan. 23 (1); †April 17 (1).
Davie—Oct. 10 (2); April 3 (2).
Yadkin—Oct. 24 (2); May 1 (2).

ELEVENTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge O. H. Allen.
SPRING TERM, 1905—Judge C. M. Cooke.

Forsyth—*July 25 (1); †Sept. 12 (2); *Oct. 10 (1); †Dec. 5 (2); *Feb. 13 (2); †Mar. 13 (2); May 22 (2).
Rockingham—*Aug. 1 (1); Nov. 7 (2); Feb. 27 (2); †June 12 (1).
Wilkes—Aug. 8 (2); †Oct. 24 (2); *Jan. 30 (1); †June 5 (1).
Alleghany—Aug. 22 (1); Mar. 27 (1).
Surry—†Aug. 29 (2); Nov. 21 (2); April 24 (2).
Stokes—Sept. 26 (2); May 8 (2).
Caswell—Oct. 17 (1); April 17 (1).

TWELFTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge W. R. Allen.
SPRING TERM, 1905—Judge O. H. Allen.

Mecklenburg—† July 18 (2); *Aug. 15 (2); Sept. 26 (4); Nov. 28 (2); †Jan. 16 (2); *Feb. 13 (2); †Mar. 13 (2); April 24 (2); June 5 (2).
Cleveland—Aug. 1 (2); Nov. 7 (2); Mar. 27 (2).
Cabarrus—Aug. 29 (1); Oct. 24 (2); Jan. 30 (2); May 8 (2).
Lincoln—Sept. 5 (1); Dec. 12 (1); April 10 (2).
Gaston—Sept. 12 (2); Nov. 21 (1); Feb. 27 (2); May 22 (2).

THIRTEENTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge T. A. McNeill.
SPRING TERM, 1905—Judge W. R. Allen.

Catawba—July 11 (2); Oct. 31 (2); Feb. 6 (2); †May 8 (2).
Ashe—July 25 (2); Oct. 10 (2); April 10 (2).
Watauga—Aug. 8 (2); Mar. 27 (2); June 5 (1).
Caldwell—*Sept. 19 (2); †Nov. 28 (2); Feb. 27 (2).
Mitchell—Nov. 14 (2); May 22 (2).
Alexander—Oct. 3 (1); Feb. 20 (1)

FOURTEENTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge W. H. Neal.
SPRING TERM, 1905—Judge T. A. McNeill.

McDowell—Aug. 8 (2); Oct. 24 (2); Feb. 20 (2).
Rutherford—†Sept. 5 (2); Nov. 21 (2); March 13 (2).
Henderson—*Sept. 19 (2); ‡Nov. 7 (2); *Mar. 6 (1); ‡May 15 (2).
Polk—Oct. 3 (1); Mar. 27 (2).
Burke—†Oct. 10 (2); April 10 (2); †June 5 (2).
Yancey—Dec. 5 (2); April 24 (2).

FIFTEENTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge T. J. Shaw.
SPRING TERM, 1905—Judge W. H. Neal.

Buncombe—*Aug. 1 (2); †Sept. 12 (6); *Nov. 14 (2); †Dec. 5 (2); *Feb. 6 (3); †Mar. 13 (4); *April 24 (2); †May 29 (4).
Madison—*Aug. 15 (2); †Oct. 24 (2); †Jan. 23 (2); *Feb. 27 (2); †May 8 (2).
Transylvania—Aug. 29 (2); Nov. 28 (1); April 10 (2).

SIXTEENTH JUDICIAL DISTRICT.

FALL TERM, 1904—Judge B. F. Long.
SPRING TERM, 1905—Judge T. J. Shaw.

Swain—†July 25 (2); Oct. 24 (2); Mar. 6 (2).
Cherokee—Aug. 8 (2); Nov. 7 (2); April 3 (2).
Macon—Aug. 22 (2); †Nov. 21 (2); April 24 (2).
Graham—Sept. 5 (2); Mar. 20 (2).
Clay—Sept. 19 (1); April 17 (1).
Haywood—Sept. 26 (2); Feb. 6 (2); May 8 (2).
Jackson—Oct. 10 (2); *Feb. 20 (2); †May 22 (2).

*For criminal cases only. †For civil cases only. ‡For civil and jail cases.

UNITED STATES COURTS FOR NORTH CAROLINA.

CIRCUIT COURT.

JETER C. PRITCHARD, Judge, Asheville, N. C.

DISTRICT COURTS.

EASTERN DISTRICT, Thomas R. Purnell, Judge, Raleigh.
WESTERN DISTRICT, James E. Boyd, Judge, Greensboro.

UNITED STATES CIRCUIT COURT.

Terms.—Wilmington, first Monday after fourth Monday in April and October.
Raleigh, fourth Monday in May and first Monday in December.

UNITED STATES DISTRICT COURT.

EASTERN DISTRICT.

Terms.—Elizabeth City, third Monday in April and October.
New Bern, fourth Monday in April and October.
Wilmington, first Monday after fourth Monday in April and October.
Raleigh, fourth Monday in May and first Monday in December.

OFFICERS.

Harry Skinner, United States District Attorney, Raleigh.
J. A. Giles, Assistant United States District Attorney, Pittsboro.
Henry C. Dockery, United States Marshal, Rockingham.
H. L. Grant, Clerk United States District and Circuit Courts for the Eastern District of North Carolina, Goldsboro.

DEPUTY CLERKS.

George L. Tonnoffski, Raleigh.
W. H. Shaw, Deputy Clerk for both Circuit and District Courts, Wilmington.
George Green, New Bern.
John P. Overman, Elizabeth City.

WESTERN DISTRICT.

Terms.—Circuit and District terms are held at same time and place, as follows:
Greensboro, first Monday in April and October, Samuel L. Trogden, Clerk.
Statesville, third Monday in April and October, H. C. Cowles, Clerk.
Asheville, first Monday in May and November, W. S. Hyams, Clerk.
Charlotte, second Monday in June and December, H. C. Cowles, Clerk.

A. E. Holton, United States District Attorney, Winston.
A. H. Price, Assistant United States District Attorney, Salisbury.
J. M. Milliken, United States Marshal, Greensboro.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

SPRING TERM, 1904.

PLYMOUTH v. COOPER.

(Filed April 12, 1904).

ORDINANCES — *Municipal Corporations—Licenses—Livery Stables—The Code, sec. 3800—Const. N. C., Art. V, sec. 3.*

An ordinance requiring a license of livery-men, and providing that it shall include any persons making contract for hire in town, "or carry any person with a vehicle out of the town for hire," is not only void as being unreasonable, but is unlawful as well.

MONTGOMERY, J., dissenting.

ACTION by the Town of Plymouth against W. D. Cooper, heard by *Judge W. B. Council,* at Fall Term, 1903, of the Superior Court of WASHINGTON County.

This action comes up on a special verdict, of which the following are the material parts:

That on July 20, 1903, and for many years prior thereto, the defendant was and had been and still is a resident of Roper, N. C., a village nine miles from Plymouth, N. C.

That said defendant was on said July 20, 1903, engaged in livery business at Roper, N. C., having obtained from the county and State the license required by law.

That several days prior to July 20, 1903, the defendant, while at Roper, N. C., received a letter from Charles Balfour, a traveling salesman for J. H. LeRoy Co., Elizabeth City, N. C., asking defendant to meet him at Plymouth, N. C., and convey him to Roper and thence to Creswell and Columbia on said 20th July, which the defendant wrote him he would do, and did do so, charging the said Balfour for said services his customary price.

That on June 1, 1903, the commissioners of Plymouth passed the following ordinance, among others, in reference to taxation:

"On livery stables and persons keeping a horse or horses for hire, or doing any livery business or hiring of horses in the town, $7.50. This shall include any persons making contract for hire in town or carrying any person with a vehicle out of the town for hire."

This ordinance was in force on July 20, 1903, if said commissioners had authority under the law to pass it.

The defendant has never paid said tax.

Under the instruction of the Court the jury thereupon returned a verdict of guilty, and the defendant was fined $25 in accordance with the ordinance.

Robert D. Gilmer, Attorney-General, and *Bragaw & Ward,* for the State.

A. O. Gaylord, for the defendant.

DOUGLAS, J., after stating the case. We are of opinion that upon the special verdict the defendant was entitled to a judgment of not guilty, inasmuch as the town commissioners did not have the power to pass the ordinance, and that the

ordinance is unreasonable. We refer to that part of the ordinance under which the defendant is convicted and which includes among those taxed for the privilege of doing a livery business "any person carrying any person with a vehicle out of the town for hire." This is the only question before us. It is found that the defendant is a resident of the village of Roper, N. C., where he is carrying on the livery business, having paid both the State and county tax. There is no allegation that he is carrying on the livery *business* at Plymouth, or that he is in the habit of taking people out of Plymouth. As far as we can see, this is his first passenger and he was carrying him under a contract made at Roper, or at Elizabeth City, certainly while neither of the parties were at Plymouth. It seems there is no harm in taking people into Plymouth in a vehicle, provided you put them out and leave them there. People may pay a man to bring them into town but must walk home unless they conclude to make the town their permanent residence, or can get some local inhabitant to take them away. This may sound like a *reductio ad absurdum,* but it is a plain statement of the possible operation of the ordinance if sustained and carried to its legitimate result. Suppose a man living in Roper were compelled to visit Plymouth for an hour or two on some business. He could hire the defendant to carry him into the town, but he could not return by the same vehicle. Again, a man might hire a conveyance to take him from Roper to some place beyond Plymouth. If Plymouth lay directly in the way he would have to go out of his way to drive around the town, or get out and hire a Plymouth man to take him the rest of the way. Surely the Legislature never intended any such result, nor should the Courts place such a construction upon the law as to legalize such action. It would require a livery-man, who had paid all the taxes

at his home, to pay an additional tax in every town to which he happened to send a vehicle, even if only once a year.

The ordinance is not only unreasonable but, in our opinion, is clearly unlawful. The question of the general power of the town to tax trades, occupations, and professions is not before us; and we therefore confine ourselves to that part of the ordinance under which the defendant was convicted.

It seems to be assumed in behalf of the town that the numerous class of cases holding invalid certain forms of municipal taxation have in some way been done away with by the change in the law. We do not so understand it. The principle of those cases remains in full force to the effect that "the authorities of a town can impose no taxes except as authorized by its charter or general laws applicable thereto. Section 3800 of The Code says nothing to the contrary, but simply specifies what may be taxed. It says "they may also lay taxes for municipal purposes on all persons, property, privileges and subjects within the corporate limits, which are liable to taxation for State and county purposes." This section requires two prerequisites: the subject of taxation must be within the corporate limits, and must be identically liable to State and county taxes. Is the act of "carrying any person with a vehicle out of the town (of Plymouth) for hire," liable to State and county taxes? If not, then it is not liable to town taxes. It is evident that the permissive taxation extends only to a trade, profession or ordinary occupation, and not to a single act. It is intended to comply with Article V, section 3, of the Constitution, which reads in part as follows: "The General Assembly may also tax trades, professions, franchises and incomes."

We are referred to the reasoning in *Winston v. Taylor*, 99 N. C., 210, but we must not overlook the facts of that case. There the jury found that the defendants "made a business of purchasing their stock of leaf on the floors of the tobacco

warehouses in the town of Winston and carrying the same on drays to their factory in Salem," and that "they attended the auction sales of leaf tobacco *regularly* for the purpose above indicated." If the defendant had made a business of sending his hacks regularly into the town of Plymouth the case would be different, but there is neither evidence nor suggestion of such a fact.

Neither a municipal corporation nor even the Legislature can change the meaning of words so as to make that a crime which would not be a crime if called by its proper name. In the case at bar, the town could tax the livery business and could define the business, provided it did not carry the definition beyond the limits of its taxing power. When it said that the livery business should include the single act of carrying a passenger out of town for hire, it simply said in legal effect that such an act should be taxed to the same extent as the livery business. If the town had the right to tax that single act, then the ordinance was valid; but calling that single act a *business* did not make it so, nor did it create the right to tax where it did not already exist. This is clearly laid down in *State v. Ninestein,* 132 N. C., 1039, where the Court says, on page 1042: "Ordinarily the General Assembly has no power to construe an act, but when it imposes a tax upon peddlers and in the same act defines who are peddlers, it is equivalent to imposing a tax upon all persons engaged in the occupations therein specified." In that case the definition was legal because the State had the right to tax the occupations it construed to be peddling. But suppose the act had declared that all foreign drummers should be peddlers and should be taxed accordingly, it would not have made them peddlers, nor would it have legalized their taxation. The power of taxation cannot rest upon legal fictions or irrebutable presumptions. Moreover, all municipal powers are strictly construed, and especially those relating to

taxation. In *Latta v. Williams,* 87 N. C., 126, *Ashe, J.,* speaking for the Court, says:

"In the construction of municipal powers, it is held to be a general rule that the powers of a municipal corporation are to be construed with strictness, and *Judge Cooley* in his work on taxation (page 387) says this rule is peculiarly applicable to taxes on occupations. 'It is presumed,' he adds, 'the Legislature has granted in plain terms all it has intended to grant at all. If it is not manifest that there has been a purpose by the Legislature to give authority for collecting a revenue by taxes on specified occupations, any exaction for that purpose will be illegal.' "

We think that upon the special verdict the defendant is entitled to a judgment of not guilty.

Reversed.

MONTGOMERY, J., dissenting. For a violation of an ordinance of the town of Plymouth the defendant was convicted in the Mayor's court, sentenced to pay the fine imposed by the ordinance, and appealed to the Superior Court of Washington County. In that Court the jury rendered a special verdict, the material facts found being as follows: That on June 1, 1903, the town commissioners passed an ordinance as follows: "On livery stables and persons keeping a horse or horses for hire, or doing any livery business or hiring of horses in the town, $7.50. This shall include any person making contracts for hire in the town, or carrying any person with a vehicle out of the town for hire." That the defendant was a resident on July 20, 1903, of Roper, N. C., a village nine miles from Plymouth, and was engaged in the livery business at that time at Roper, having obtained license from the county and State to engage in the business, and that the defendant received a letter at Roper from a Mr. Balfour, posted at Elizabeth City, in which letter the

defendant was asked to meet Balfour at Plymouth and convey him thence to Roper and thence to other places, which the defendant did, making his customary charge for such service. Judgment of guilty was rendered upon the verdict, and the defendant appealed.

The defendant, in this Court, through his counsel, rested his defense on the grounds, first, that the town commissioners did not have the power to pass the ordinance; and second, that it was unreasonable and oppressive. Under the first line of defense the contention was that in the articles of incorporation of Plymouth, chapter 213 of the Private Laws of 1903, there was no specific power granted to the town to levy such a privilege tax as that mentioned in the ordinance, and that as that power was not specifically granted in the charter, the act of the commissioners in enacting the ordinance was *ultra vires*, and therefore null and void. And numerous cases, like *Pullen v. Raleigh*, 68 N. C., 451, and *Latta v. Williams*, 87 N. C., 126, were cited in support of the position. But at the time those decisions were made, the power to levy such a tax as that imposed by the ordinance was not authorized by the general law, as it was when the commissioners in the case before us passed the ordinance. In the last-mentioned case *Judge Ashe*, for the Court, said: "The construction we have given to the charter of the town of Davidson College is in consonance with the policy of the Legislature in regard to powers of taxation by municipal corporations, as indicated in the act entitled 'Towns,' Bat. Rev., ch. 111, sec. 16. There it declares that towns may levy a tax on real estate situated within the corporation, on such polls as are taxed by the General Assembly for public purposes, on all persons (apothecaries and druggists excepted) retailing or selling liquors or wines of the measure of a quart or less a tax not exceeding $25, on all such shows and exhibitions for reward as

are taxed by the General Assembly, on all dogs and on swine, horses and cattle running at large within the town. There is nothing in the act to authorize the right to tax trades or occupations, and when the Legislature has refrained from granting such power in a general law, it would not be reasonable to presume, in the absence of any express declaration to that effect, it intended to do so when it was granting special power of taxation." Section 16 of chapter 111 of Battle's Revisal, was brought forward in The Code, and with an addition thereto, made by the Code Commissioners, is now section 3800 of The Code, and that addition made by the Code Commissioners confers on the town authorities the power to levy such privilege taxes. The language is: "They may also lay taxes for municipal purposes on all persons, property, privileges and subjects within the corporate limits, which are liable to taxation for State and county purposes." Under Schedule B of the Revenue Act of 1903 the imposition of a license tax on the livery business was provided for; and besides, in the act of incorporation of the town of Plymouth, chapter 213 of Private Acts of 1903, by section 10, it is specially declared that section 3800 of The Code shall apply to the town of Plymouth.

In *Guano Co. v. Tarboro,* 126 N. C., 68, and *State v. Irvin,* 126 N. C., 989, this Court has held that under section 3800 of The Code, although such a power may not exist in the subjects of taxation enumerated in their charters, towns and cities may tax trades and professions and other privileges.

The second ground of defense, that is, that the tax is void on the ground that it is unjust, oppressive and unreasonable, cannot be maintained. The fact that the defendant is a non-resident of Plymouth cannot, in my opinion, relieve him from liability to pay the tax prescribed by the ordinance if he undertakes to do the livery business in Plymouth by carrying passengers out of the town. If so, he might

keep his vehicles and stables just outside the town limits and thereby escape the privilege tax, as well as by competition injure or destroy the business of other livery-men who live inside the town and pay the tax. "The Legislature may authorize municipal corporations to impose taxes upon persons whose ordinary avocations are pursued within the corporate limits, although residing beyond those limits, the same as upon residents." 2 Dillon Mun. Corp. (4 Ed.), sec. 791. And the same principle is decided in *City of Memphis v. Battaile & Co.,* 55 Tenn., 524, 24 Am. Rep., 285. In *Winston v. Taylor,* 99 N. C., 210, *Judge Davis,* for the Court, in illustrating the decision in that case, said: "If a livery-man or drayman resident in Greensboro should send his omnibus and hacks or drays into the town of Winston, and claim and be allowed the privilege of doing business there without the payment of taxes because he was a nonresident, it would be deemed a very unjust discrimination by the resident livery-men and draymen"; and we adopt his reasoning on that point in the case before us.

BROWN v. HAMILTON.

(Filed April 12, 1904).

WILLS—*Legacies and Devises—The Code, sec. 2141.*

Where a testator devised his lands south of a certain line, "containing by estimation two hundred acres," and subsequently he purchased other lands south of the line, the reference to the number of acres did not prevent the latter lands being included in the devise.

ACTION by Thomas Brown and others against H. D. Hamilton and others, heard by *Judge W. R. Allen*, at December Term, 1903, of the Superior Court of RANDOLPH County. From a judgment for the plaintiffs, the defendants appealed.

Hammer & Spence, for the plaintiffs
Oscar L. Sapp, for the defendants.

CLARK, C. J. The testator devised to the defendant, his daughter, "all that tract or parcel of land which lies south of the line beginning at the northeast corner of K. L. Winningham's land and running thence east to the Wiley Cox line, containing, by estimation, 200 acres." In his will he divided and devised the rest of his land, marking it out by boundaries in the same way, to his other three children. The will was executed May 14, 1897, at which time the testator owned three contiguous tracts south of said line, aggregating about 250 acres. On September 9, 1898, the testator acquired 66½ acres more touching in its whole length the said 250 acres and on the south thereof, and died September 25, 1900. This is a petition by the other children alleging that the testator died intestate as to said 66½ acres and asking that it be sold for partition.

It is provided by The Code, section 2141, that a will

shall speak as of the death of the testator. It is also well settled that the presumption is against one's dying intestate as to any part of his estate. Of course these rules are subject to the stronger rule that the intent of the testator, clearly expressed, shall govern. But here the will shows an intent on its face to specifically dispose of all the testator's property. The testator knew that he had given by his will all his land south of a designated line to his daughter, and when he bought this land south of said line the following year he also knew that it fell within the devise to his daughter (the defendant), and if he had wished it to be taken out of such devise he would have added a codicil. On the contrary, though he lived more than two years after the purchase of said land, he made no change in his will. We attach no importance to the argument that the words used "all that tract south of said line," for when the 66½ acres adjoining were bought it became a part of the land south of the line. The said tract at the date of the will consisted of three contiguous tracts but were treated as one. Laws 1844, chapter 88, section 3, now The Code, section 2141, requires that the will shall be construed "to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intent shall appear by the will," and none here appears. A case very much in point is *In re Champion*, 45 N. C., 246. *Hines v. Mercer*, 125 N. C., 71, is not in point, for there the subsequently acquired land did not come within the terms of the specific devise, and, besides, there was a residuary clause. The reference to the number of acres (200 acres) cannot control the boundaries described in the deed. *Lyon v. Lyon*, 96 N. C., 439. There is no doubtful boundary to render the number of acres material to be considered, as in *Cox v. Cox*, 91 N. C., 256.

Error.

CANDLER v. ELECTRIC CO.

(Filed April 12, 1904).

JUDGMENTS — *Arbitration and Award—Former Adjudication—The Code, sec. 1859—Damages.*

In an action to recover damages for injuries by ponding water on land, the judgment set out in this case does not estop the plaintiffs from recovering permanent damages.

ACTION by T. J. Candler and another against the Asheville Electric Company, heard by *Judge W. A. Hoke* and a jury, at May Term, 1903, of the Superior Court of BUNCOMBE County. From a judgment for the plaintiffs, the defendant appealed.

F. A. Sondley, for the plaintiffs.
J. C. Martin, for the defendant.

MONTGOMERY, J. This action was brought for the abatement of an alleged nuisance, viz., a dam maintained by the defendant company across a stream below the land of the *feme* plaintiff, and to recover damages for alleged injuries done to the lands through the ponding of water on the same caused by the dam. The defendant in its answer denied that any injury had been done to the land by means of the dam, and also pleaded as an estoppel the award and judgment made in a certain action between the present plaintiffs, who were also plaintiffs there, and the West Asheville Improvement Company and J. E. Rankin and J. E. Cutler, receivers of the West Asheville Improvement Company, defendants, made at the August term, 1898, of Buncombe Superior Court. In that action the plaintiffs brought suit against the West Asheville Improvement Company for the abatement of the

same dam as a nuisance and for the recovery of damages for injury to the same tract of land of the *feme* plaintiff caused by the ponding of water on the land. The complaint in that action was filed at the December Term, 1895, of Buncombe Superior Court, and after the charter of the West Asheville Improvement Company had been repealed by the General Assembly and after Rankin and Cutler had been appointed receivers of the company. At the December Term, 1897, of that Court, by consent of all the parties, it was ordered that the issues arising upon the pleadings be submitted to the arbitrament and award of A. H. Fetmont and George S. Powell as arbitrators, who should, as such arbitrators, hear the cause and examine into the matters therein involved and determine the same; that they should find and award whether or not the plaintiffs, or either one of them, were entitled to any damages from the defendant, or any of them, and if so, what damages, distinguishing in so doing between damages by reason of permanent injuries to the land described in the complaint, if any such they should find, and annual damages if any such they should find for the period of five years from and after September 1, 1893; and it was further ordered that the award of the arbitrators should be the rule of the Court, and that judgment should be rendered thereon for said permanent damages and, as under the mill-dam act, for said annual damages for five years as aforesaid. At the August Term, 1898, of the Superior Court the arbitrators reported an award in the following words: (1) "They assess the permanent damage of the plaintiffs to this date, to their lands described and referred to in the complaint in this cause, at the sum of $500, including interest. (2) They find and award that the plaintiffs have suffered an annual damage of $235.20 per annum, including interest, for five years, beginning September 1, 1893, making a total damage for said period of five years on account of loss of crops on said lands

the sum of $1,176. This makes the total damages assessed by us herein $1,676. And your arbitrators further award that said sums are to bear interest from the filing of this award until paid."

And at the same term judgment was rendered upon the award for the sum of $1,676, the amount of the damages aforesaid so sustained by the plaintiffs as above set forth, with interest on the same at the rate of six per centum per annum from August 17, 1898, until paid: the said sum being the damages so sustained by the plaintiffs as aforesaid, the sum of $500 as permanent damages up to August 17, 1898, sustained by the plaintiffs to their lands described in the complaint in this action by reason of the matters therein complained of, and the additional sum of $1,176, the total of the annual damages sustained additional to said permanent damages by the plaintiffs to their said lands by reason of the matters so complained of during said five years commencing September 1, 1893, which said annual damages amount to the sum of $235.20 per year for every year of the said period of five years, beginning September 1, 1893, and continuing until the expiration of five years.

The judgment contained this further provision: "And it is further ordered and adjudged that execution issue upon this judgment, and this judgment shall be and is subject to the provisions of chapter 43 of the first volume of The Code of North Carolina, and in particular to the provisions of section 1859 of said Code of North Carolina, and for that purpose this cause is retained upon the docket for further proceedings, orders, judgments and decrees; and the question of the abatement of the dam mentioned in the pleadings in this action as a nuisance and of injunction in regard thereto is, accordingly, hereby reserved until return of execution hereon to be determined upon the pleadings in this action; and the record herein, the admissions and allegations

in them contained, the orders herein, said award, this judgment and the matters determined or found or both by or in it, and upon such further evidence as may be hereinafter adduced and finding as may be hereafter in this action had, in accordance with the law and course of practice of this Court and consistent with them."

The judgment record in that case showed that the judgment was paid off in full on September 19, 1898, by the Asheville Electric Company, the defendant in the present action. In the present action two issues were submitted to the jury by the Court, the first one in these words: "Has there heretofore been an arbitration and award and satisfaction concerning the dam and injuries caused thereby between the parties to this action, and on what terms?" and the second was, "What is the entire damage, permanent and prospective, wrongfully done to plaintiffs' land by defendant's dam occurring since September, 1898, the dam to remain out or reduced to the height of the original Shuford or Stephens dam?" The jury answered the first issue "Yes," and "The terms are as shown in the record presented." And they answered the second issue, "Permanent $100, rental $600, total $700," and judgment was rendered accordingly against the defendant. The record referred to in the verdict of the jury was the record in the case of the plaintiffs against the West End Asheville Improvement Company and Rankin and Cutler, receivers, and which record we have referred to sufficiently already for the purposes of this opinion.

That the second issue may be understood, it is necessary for us to state that the Shuford or Stephens dam was erected over forty years ago on the same spot where stood the dam which was erected by the West End Improvement Company of Asheville in 1892, and which the defendant in this action maintained after August, 1898. The Stephens or Shuford dam was fourteen feet high and was used to store water

for an ordinary country grist-mill, and the dam maintained by the defendants, and as it was erected by the West End Asheville Improvement Company, was thirty feet high, used for the purposes of storing water to furnish an electric plant.

The defendant appealed from the judgment. Its main contention is that the award and judgment in the action which was commenced by the plaintiffs against the West End Asheville Improvement Company and Rankin and Cutler, receivers, were in meaning and effect an award and judgment for permanent damages—damages for past, present and prospective injury—and equivalent to a purchase of the easement to pond water on the plaintiffs' land; and that therefore the plaintiffs are estopped from claiming damages of any nature against the defendant in this action because of the purchase by the defendant from Cutler and Rankin, receivers of the West End Asheville Improvement Company, of all the property of that company, including the dam and site of the mill. The other contention of the defendant is that if the judgment in this action is not a complete bar to the plaintiffs' right of recovery, it is as a bar to the recovery of all damages except such as were suffered by the plaintiffs on account of additional injuries or injuries to additional lands of the plaintiffs after September 1, 1898; or, to put it in other words, if there had been no increased injury to the plaintiffs' land afterwards, the plaintiffs could recover nothing in this action, because the former award and judgment gave the right to the defendant, as purchaser from the receivers, to maintain the dam as it was at the time of the award without being liable to any further damages.

In the trial below the Court was of the opinion that neither of the defendant's contentions could be upheld. His Honor instructed the jury, in substance, that the award and judgment did not amount to the purchase of the easement to pond the water, nor to a condemnation of the land; that the award

having provided for all present and current damages to the land up to September 1, 1898, would preclude all damages to that date on the assumption that the defendant would then remove the dam or reduce it to the height of the old Stephens dam; and the true rule of damage was for the jury to assess all damages, past, present and prospective, which had occurred since September 1, 1898, comparing the land, not with the condition it was in originally, but with the condition it would have been in had the defendant taken out the dam or reduced it to fourteen feet, the height of the original Stephens dam.

The Court further instructed the jury on the rule of damages applicable to the case, as follows:

"Award both permanent damage, if any occurred since September 1, 1898, permanent destruction of the land or injury to it causing loss of productive capacity, and also current damages, loss of rents and profits, if any, caused by any increase in area injuriously affected and by delay in reclaiming the land because the dam was not lowered or removed on September 1, 1898. Language of issue is both present and prospective and the jury will award damages, if they find such, of both kinds that may have accrued since September 1, 1898, or which will accrue from the dam or delay in taking it out."

We find no error in the view which his Honor took of the case, or in the instructions which he gave to the jury. It is clear from the language of the award, and the judgment which followed thereon, in the suit of the plaintiffs against the West End Asheville Improvement Company, that permanent damages in the sense which that term is used in *Ridley v. Railroad,* 118 N. C., 996, 32 L. R. A., 708, and in *Parker v. Railroad,* 119 N. C., 677, were not meant to be fixed or allowed in that action. In the two just above-mentioned cases permanent damages meant such damages as were

apparently to be continuous and prospective, because being permanent and likely to continue indefinitely as the natural effect of that cause. But there is another kind of permanent damage referred to in *Beach v. Railroad,* 120 N. C., 498, as damage done by one act, or all at once, such as the destruction of forests or an orchard, or the demolition of a house, and such must have been the damages assessed as permanent under the arbitration referred to. Anyway, it did not embrace permanent damages in the sense that those words were used in Ridley's and Parker's cases, *supra.* Because they were assessed, not for prospective damages, but up to a specified period, to-wit, September 1, 1898. The assessment of the annual damages under the arbitration for the five years preceding September 1, 1898, was, according to the award and judgment, to be treated as assessed under the mill-dam act, chapter 43 of The Code; and the damages sought to be recovered in the present action were therefore to be considered in connection with the condition of the land as it would have been in case the defendant had removed the dam at the time of the award or reduced it to the height of the Stephens dam according to the instructions of his Honor. The defendant acquired no easement to pond the water on the plaintiffs' land under the award of 1898, and there was no purpose to condemn the land under that arbitration and award. It is not necessary from the view we have taken of the case to discuss the other questions raised by the appeal.

Affirmed.

MILLIKEN v. DENNY.

(Filed April 12, 1904).

1. EASEMENTS—*Dedication—Alleys—Pleadings—The Code, sec. 240.*

The complaint in this action to restrain the closing of an alley is not sufficient to show an easement in the plaintiff, the adjoining land owner, entitling him to enjoin the obstruction thereof.

2. EASEMENTS—*Alleys—Streets—Dedication.*

An alley is not necessarily a street and the public have not necessarily a right to its use.

ACTION by J. M. Milliken against G. W. Denny, heard by *Judge O. H. Allen* at December Term, 1903, of the Superior Court of GUILFORD County. From a judgment for the plaintiff the defendant appealed.

E. J. Justice and *King & Kimball,* for the plaintiff.

Scales, Taylor & Scales and *R. D. Douglas,* for the defendant.

CONNOR, J. The plaintiff alleged that on August 14, 1890, George A. Dick, trustee, and Mary E. Dick, by and with the consent of her husband, R. P. Dick, executed to Julia P. Dick a deed for about three acres of land in the city of Greensboro, "which said land was bounded on the north by a ten-foot alley connecting Percy street and Chestnut street; on the east by Percy street, and on the west by Chestnut street, more particularly described in said deed as beginning at a stone on Chestnut street ten feet south of the southwest corner of George A. Dick's home lot; running thence along Chestnut street south 3 degrees and 45 minutes west 378½ feet to a stone; thence south 84 degrees and 22 minutes east 316½ feet to a stone on Percy

street; thence north 6 degrees and 39 minutes east 383½ feet to a stone; thence north 84 *degrees* and 22 *minutes west* 340 *feet along the south side of a ten-foot alley*, containing three acres, etc." Said deed was duly recorded.

That subsequently the said Julia P. Dick conveyed the said land by deed, containing like calls to those above set out, to George A. Dick, which said deed was duly recorded. That thereafter George A. Dick, by deed, containing a like description to that set out in the two deeds above mentioned, conveyed said land to Cæsar Cone, which deed was duly recorded. That subsequently Cæsar Cone and wife conveyed a part of said land to the plaintiff by deed containing the following description: "Beginning at a stone in the north side of Summit avenue and 75 feet westerly from a stone in the northwest intersection of Summit avenue and Percy street, running thence north 36 degrees and 56 minutes west 66.25 feet to a stone on the north side of a ten-foot alley; thence north with the south side of said alley 84 degrees and 49 minutes west 80 feet to a stone, etc." That the ten-foot alley called for in the description in the said deed to the plaintiff is the same alley running between Percy and Chestnut streets north 84 degrees and 49 minutes west, which is established, called for and set out in each of the deeds above referred to, prior to the conveyance to the plaintiff of the land described in said deed to him. That subsequent to the execution and registration of the first three above-mentioned deeds, Mary E. Dick and George A. Dick, trustee, who were the grantors in the deed first above mentioned to Julia P. Dick, executed to the defendant G. W. Denny a quitclaim deed for the alley above referred to, describing the land thereby conveyed as beginning on the east side of Chestnut street at the southwest corner of the home place, formerly owned by George A. Dick, and running about 350 feet to Percy street; thence southerly with Percy street 10 feet to the

corner of the lot sold by George A. Dick to Cæsar Cone, thence westerly with the north line of said lot about 350 feet to Chestnut street; thence northerly with Chestnut street 10 feet to the beginning," which deed was duly recorded. That the defendant had actual knowledge that the said alley was called for in such of the conveyances above mentioned as were executed and registered prior to the execution of the above-mentioned deed to him. That the plaintiff agreed to purchase from Cæsar Cone, and took from him a contract in writing to convey the land described in the deed from said Cæsar Cone to the plaintiff long before the defendant received from the said George A. Dick, trustee, and Mrs. Mary E. Dick, the said deed for the said ten-foot alley above described. That the plaintiff, relying upon the fact that the said alley was called for in the deeds above set out, and upon the faith that it would be kept open, was induced to purchase the said lot and pay therefor a larger sum than he would otherwise have done, the said alley giving to the plaintiff a convenient entrance to his said lot facing on Summit avenue, and upon which he has erected a house which he occupies as a home. That the defendant has since the execution to him of the quitclaim deed above-mentioned, and after being forbidden by the plaintiff to do so, closed up said alley, and thereby cut the plaintiff off from entering the back portion of his premises from Percy or Chestnut streets, and has damaged him. He prays that the defendant be enjoined from obstructing his right to pass through and over the said alley and be required to keep it open, etc. The defendant demurred, "for that the complaint does not state facts sufficient to constitute a cause of action." His Honor overruled the demurrer and ordered the defendant to open the said alley-way and enjoined him from ever closing same or in any way interfering with the free use of the same by the

plaintiff and the public who may wish to pass and repass over and along the same. From this judgment the defendant appealed.

The plaintiff contends that this case comes within the principle well settled by this Court in *Moose v. Carson,* 104 N. C., 431, 7 L. R. A., 548, 17 Am. St. Rep., 681; *State v. Fisher,* 117 N. C., 733; *Conrad v. Land Co.,* 126 N. C., 776; *Collins v. Land Co.,* 128 N. C., 563, 83 Am. St. Rep., 720—that where an individual sells or conveys a town or city lot, bounded by streets or alleys, marked out on a plat, and the grantee enters upon it and expends money in improving it, he is entitled to a right of way over such street or alley as appurtenant to the land, and any subsequent conveyance by his grantor, or those claiming under him, of the portions of such street or alley by which the grantee's lot is bounded, is void in so far as such sale may affect his right. We have no disposition to question the correctness of the law as laid down in these cases. This Court at the present term, in *Hughes v. Clark,* 134 N. C., 457, has re-affirmed the doctrine and cited with approval the cases above named. The right of purchasers to have such streets or alleys kept open for their own use and the use of their grantees is not based so much upon the theory that they have an easement, as that the dedication, evidenced by the making of the plat and the reference to it, either in the deed or in the negotiations, estops the party from closing up such street or alley or interfering with the use of them for the purpose for which they were dedicated. While there is some conflict in the authorities which we have examined, it may be said that an alley is not necessarily a street and does not necessarily signify that the public have a right to use it. An alley is defined as "a narrow passage or way in a city as distinguished from a public street." 2 Am. & Eng. Ency., 149. Webster defines it as "A narrow passage, espe-

cially a walk or passage in a garden or park, bordered by rows of trees or bushes; a bordered way. A narrow passage or way in a city as distinct from a public street." The distinction between a private and a public alley is recognized by the Supreme Court of Maryland in *Witsen v. Gutman,* 24 L. R. A., 405. It is not alleged in the complaint by whom or at what time this alley was opened or for what purpose. The language is, "That the said land was bounded on the north by a ten-foot alley connecting Percy and Chestnut streets." Whether it was opened at the time the deed was made and for the use of the two lots, or whether it had been opened before that time and dedicated to that purpose, does not appear. The nearest approach to an allegation that the alley was opened is found in the fifth paragraph: "That the ten-foot alley called for in the description in the said deed to the plaintiff is the same alley which is established, called for and set out in each of the deeds above referred to, prior to the conveyance to the plaintiff of the land described in said deed to him." We do not think that the mere fact that the deed from George A. Dick to Julia P. Dick called for a "stone," thence north 84 degrees and 22 minutes west 340 feet along the south side of the ten-foot alley," in the absence of any allegation that an alley of that width had been opened and dedicated for the use of the owners of the property conveyed, is sufficient to pass an easement to the grantee or to entitle him to enjoin the closing of such alley. No right of way or other easement is expressly granted, therefore the plaintiff's claim to such right or easement is based upon the contention that it is granted by implication upon the well-settled principle that if a man grant a piece of land surrounded by other lands belonging to him, the grantee will have by implication a right of way to pass to and from the land granted. This right arises out of the necessity of the situation of

the grantee in respect to the land granted. By the complaint in this case it appears that the lot conveyed fronted on two streets, being 216 feet apart, and fronting about 378 feet on each street. It would seem therefore that no easement or right of way would arise by implication by reason of necessity. In the present condition of the pleadings we prefer not to discuss or decide the rights of the parties except for the purpose of disposing of the demurrer.

It may be that the plaintiff can by amendment of his complaint set forth more clearly the basis and extent of his alleged right. The judgment of his Honor cannot be sustained, for that it assumes not only that the plaintiff was entitled to an alley, but that the public had a right to pass and repass over and along the same. We find no suggestion in the complaint that the alleged alley was dedicated to any public use; nor does the judgment recognize or protect such rights, if any, as the owner of the adjoining lot may have to the use of the alley. It may well be that if opened at all the alley was for the benefit of the lot conveyed and the adjoining lot. How this is will, we presume, be made to appear by an amendment to the complaint. Upon the pleadings we simply decide that his Honor should have sustained the demurrer and given the plaintiff an opportunity to amend his complaint as he may be advised. Although no objection was taken to the form of the demurrer, and we therefore treat it as sufficient, we have not overlooked the fact that it does not conform to the requirements of section 240 of The Code as construed by this Court in the cases cited in Clark's Code, sec. 240. As the defendant may, notwithstanding the defect in form of his demurrer, have made a motion in this Court for the same causes, we treat the case as if such motion had been made. *Tucker v. Baker,* 86 N. C., 1.

Error.

BRIDGERS v. COMMISSIONERS.

(Filed April 12, 1904).

MANDAMUS — *Intoxicating Liquors — County Commissioners — Licenses—Acts 1903, ch. 233.*

A *mandamus* will not lie to control the discretion given the county commissioners in issuing liquor license under Acts 1903, ch. 233.

ACTION by J. F. Bridgers against the Board of Commissioners of Wilson County, heard by *Judge Frederick Moore,* at Chambers, in Wilson, N. C., on February 16, 1904. From a judgment for the plaintiff the defendants appealed.

Shepherd & Shepherd and *F. A. & S. A. Woodard,* for the plaintiff.

Connor & Connor, F. A. Daniel and *W. A. Lucas,* for the defendants.

WALKER, J. This case is substantially like that of *Barnes v. Commissioners,* 135 N. C., 27, decided at this term. As we held in that case that *mandamus* will not lie to control the discretion given to the commissioners by the statute in the granting of licenses, there was error in the judgment of the Court in this case directing a *mandamus* to issue to the defendants commanding them to issue an order for a license to the Sheriff upon finding certain facts recited in the judgment. Remanded with directions to dismiss the action.

Error.

HOWELL v. COMMISSIONERS.

(Filed April 12, 1904).

For headnote to this case, see *Barnes v. Commissioners,* at this term.

ACTION by A. M. Howell against the Board of Commissioners of Wilson County, heard by *Judge Frederick Moore,* at Chambers, in Wilson, N. C., February 16, 1904. From a judgment for the plaintiff the defendants appealed.

Shepherd & Shepherd and *F. A. & S. A. Woodard,* for the plaintiff.

Connor & Connor, F. A. Daniels, and *W. A. Lucas,* for the defendants.

WALKER, J. The facts in this case are substantially like those in *Barnes v. Commissioners,* 135 N. C., 27, decided at this term, and for this reason it must be governed by the principle stated in that case. The Court adjudged that a *mandamus* issue to the defendants commanding them to investigate the application of the plaintiff, and if they should find that he is a fit and proper person to have license, and that the place where he proposes to sell liquors is a suitable one, then to issue an order to the Sheriff to grant him a license upon his paying the fees and taxes as required by law, or show cause why a peremptory *mandamus* should not issue. For the reasons given in *Barnes v. Commissioners of Wilson,* there was error in said judgment. Remanded with directions to dismiss the action.

Error.

BARNES v. COMMISSIONERS.

(Filed April 12, 1904).

1. INTOXICATING LIQUORS — *County Commissioners — Licenses— Mandamus—Acts 1903, ch. 233—Acts 1893, ch. 294, sec. 33—Acts 1897, ch. 168, sec. 34—Acts 1903, ch. 247, sec. 66—The Code, sec. 623.*

Under Acts 1903, ch. 233, a *mandamus* will not lie to control the discretion of the county commissioners in the matter of granting liquor licenses.

2. MANDAMUS—*Demurrer Ore Tenus—Pleadings.*

The motion of the plaintiff in *mandamus* proceedings, on the pleadings and admissions of defendant, for a *mandamus*, is in the nature of a demurrer *ore tenus* to the answer, involving the admission of the facts set out therein.

DOUGLAS, J., dissenting.

ACTION by L. A. Barnes against the Commissioners of Wilson County, heard by *Judge Frederick Moore,* at Chambers, in Wilson, N. C.

This is an action brought by the plaintiff in which he seeks to have issued a writ of *mandamus* directed to the commissioners of the county of Wilson requiring them to issue to him a license to retail liquors. As the case was heard on complaint and answer, it will be necessary to set out the substance of the pleadings. The plaintiff alleges that he is a *bona fide* resident and citizen of the said county and a legal voter therein. That the town of Black Creek is and has been an incorporated town in said county for many years, and that on October 19, 1903, in accordance with the provisions of chapter 233 of the Public Laws of 1903 (Watts Law), an election was duly held in said town to determine whether or not liquor should be sold, a majority of the votes having been cast in favor of the sale of liquor.

That in the following January the plaintiff applied to the Board of Commissioners of the town of Black Creek for a license to sell liquors for six months from the first Monday of January, 1904, which license was granted. Afterwards an application was made by him to the defendants for an order to be issued to the Sheriff of said county directing him to issue license to the plaintiff to retail liquors in Black Creek, the plaintiff, at the time of his application to the defendants, having exhibited to them his license issued by the commissioners of Black Creek. Plaintiff then alleges that, in making his said application to the defendants, he accompanied it with the necessary affidavits of six freeholders, who were tax payers and residents of Black Creek, as to his being a suitable person and as to the suitableness of the place at which he proposed to conduct his business, and that he presented sufficient proof of all the other facts required to be shown in order to entitle him to a license, and further that, in all other respects, he complied with the law and was ready and willing to pay to the Sheriff the fees and tax required by law to be paid in such cases. The plaintiff's application was refused by a vote of three against and two in favor of issuing license. Plaintiff further alleges that no evidence was introduced before the board to show that plaintiff was not a proper person to sell liquors, nor that the place where he proposed to sell was not a suitable one, and that the majority of the board who voted against granting him license did not exercise their discretion, if, under the law, they have the right to do so, but on the contrary arbitrarily refused to grant license to all parties who applied for license to sell liquors in the other incorporated towns of said county. Plaintiff prayed for a *mandamus* to compel the defendants to order the Sheriff to issue to them a license to sell liquors at the place designated in their application.

The defendants answered and admitted the allegations of

the complaint, except the allegation that the majority of the board did not exercise their discretion, but arbitrarily refused to grant a license, and that this was denied. The defendants further averred: "That, on the first Monday in January, 1904, at the regular meeting of the Board of County Commissioners of Wilson County, the plaintiff filed with said board an application in the manner and form required by law, asking for an order from said board to the Sheriff of Wilson County, directing and commanding said Sheriff to issue to the plaintiff a license to sell spirituous, vinous and malt liquors in the town of Black Creek in the county of Wilson. That at said meeting a number of other applications were also filed with said board for a like order. That in order to expedite the investigation and consideration of said applications, the defendant board set the hour of 2 P. M. on said day as the time at which the investigation and consideration of said applications should be taken up. That at said hour the said board entered into investigation and consideration of said applications, and the balance of the day was taken up in such investigation and consideration. That said board then adjourned to meet at 11 o'clock A. M. of the next day to continue such investigation and consideration, and that said board met at said hour on the following day and continued such investigation and consideration. That after an extended investigation and consideration, the application of this plaintiff and the application of each of the other parties applying for license as aforesaid, were separately balloted upon by the members of said board. That when the ballot on the plaintiff's application was counted, it appeared that four of the members of the said board had voted against the granting of the order asked and that one of the members had voted in favor thereof; whereupon the chairman of the board announced that the plaintiff's application had been rejected." A copy of the minutes

of the said meeting and the adjourned meeting is attached and asked to be taken as a part of the answer.

"That the application of this plaintiff, and the application of each and every other person filed with said board for the purpose of obtaining a license to retail liquors as aforesaid, was separately considered and investigated by said board, and that the ballot taken thereon was in each case separate."

"That said defendant, Board of Commissioners of Wilson County, is advised, informed and believes, and upon such advice, information and belief avers that the law imposes upon said board the duty and responsibility of granting or refusing to grant all licenses to retail spirituous, vinous and malt liquors in the county of Wilson, and that the law further imposes upon said board the duty and responsibility of investigating and considering and passing upon the suitableness of each and every application and the fitness of the place at which said applicant proposes to carry on business, and the duty of investigating and considering all other matters and things pertaining to the issuing of said license and the proper regulation thereof, and that the law also vests in said board a legal discretion in passing upon such application. That the refusal of the defendant, the Board of Commissioners of Wilson County, to grant to the plaintiff a license to retail liquors as aforesaid was based upon the exercise of such legal discretion, and the defendant expressly alleges that it did exercise such discretion in refusing to grant the application of the plaintiff, and that such refusal was based upon and was for reasons which to said board seemed proper."

"That said Board of Commissioners expressly deny that the members thereof, either as a board or as individuals, or jointly, or severally, or by any agreement, express or implied, arbitrarily refused to grant to the plaintiff, or to any other

person applying therefor, a license to retail liquor, on the contrary the defendant alleges that each application was separately considered and voted upon, and that in each and every case where license was refused the said board, considering the responsibility and duty imposed upon it by law, carefully considered each application in all its phases, and that the refusal to grant the applicant a license as aforesaid was in the careful and diligent exercise of the legal discretion which said board is advised, informed and believes is vested in it by law, and was the result of a careful investigation and consideration of facts known to the members of said board."

The case came on to be heard, whereupon the following judgment was rendered: "This cause coming on to be heard and having been heard, now, upon motion of the plaintiff for judgment upon the pleadings in the cause and the admission of the defendants in open Court that the plaintiff L. A. Barnes is a proper person to sell spirituous, vinous and malt liquors:

"It is considered, ordered and adjudged that the defendant, the Board of Commissioners of Wilson County, forthwith assemble at the court-house in the town of Wilson, North Carolina, and, after due notice to the plaintiff, hear such testimony as may be offered at said meeting as to the question whether the building specified in the plaintiff's application is a suitable place for carrying on the business of selling spirituous, vinous and malt liquors, and after hearing such testimony find whether the said building is a proper place for carrying on said business or not, and record its finding upon said question upon the records of the said Board of Commissioners of Wilson County.

"It is further ordered and adjudged that if the said Board of Commissioners shall find that the building specified in plaintiff's application for license to sell spirituous, vinous

and malt liquors is a suitable place for carrying on said business, the said Board of Commissioners of Wilson County forthwith issue its order to the Sheriff of Wilson County to issue to the plaintiff license to sell spirituous, vinous and malt liquors, as prayed for in his application heretofore filed with said board, upon the payment by the said plaintiff of the taxes and fees required by law.

"It is further ordered and adjudged that if for any cause the said Board of Commissioners of Wilson County, after hearing testimony as to the suitability of the said building for the purpose aforesaid, shall fail or refuse to issue the said order to the Sheriff of Wilson County, the said Board of Commissioners shall, on Friday, February 19, 1904, show cause before the undersigned Judge of the Superior Court at Wilson, N. C., why a peremptory *mandamus* should not be issued against the said board commanding the said board to issue the said order to the Sheriff of Wilson County."

To the judgment the defendant duly excepted and appealed.

Shepherd & Shepherd and *F. A. & S. A. Woodard,* for the plaintiff.

Connor & Connor, F. A. Daniels and *W. A. Lucas,* for the defendants.

WALKER, J., after stating the case. The discussion of this case may be conveniently divided into three parts: (1) What was the law in regard to the nature of the discretion of the commissioners in granting licenses prior to the passage of the Act of 1903, chapter 233 (Watts Law)? (2) Has the law been changed by that act so as to limit their discretion and, if so, to what extent? (3) Was the particular judgment rendered by the Court erroneous in any view of the case?

It was provided by the Revised Statutes, chapter 83, section 7, that every person wishing to retail liquors by the small measure shall apply to the Court of Pleas and Quarter Sessions and obtain an order therefor, which order *shall* be granted by the said Court upon the applicant showing satisfactorily to the Court his good moral character by at least two witnesses of known respectability.

This statute was reviewed by this Court in *Attorney-General v. Justices,* 27 N. C., 315, and a substantial statement of what was therein decided will shed much light upon the question now in hand. The true meaning and signification of the language used in the Revised Statutes was elaborately considered by the Court, and the conclusion it reached, and the reasons for it, were stated with great learning and ability by *Chief Justice Ruffin.* We understand these to be the principles of law settled by that decision:

The justices of the County Court were not bound to grant a license to retail spirituous liquors to every one who proved himself of good moral character; nor had they, on the other hand, the arbitrary power to refuse, at their will, all applicants for license, who had the qualifications required by the statute.

They had the right to exercise only a sound, legal discretion, referring itself to the wants and convenience of the people, to the particular location in which the retailing was to be carried on, and to the number of retailers that were required for the public accommodation.

The justices having a discretion to a certain extent in granting licenses to retail, a *mandamus* will not lie to compel them to grant a license to any particular individual, though he may have been improperly refused a license.

But, if magistrates, fully informed that they have discretion to regulate a branch of the public police (as, in this case, in granting licenses to retailers), perversely abuse

their discretion by obstinately resolving not to exercise it at all, or by exercising it in a way purposely to defeat the legislative intention, or to oppress an individual, such an intentional and therefore corrupt violation of duty and law must be answered for on indictment.

In regard to the right of the Courts to review this discretion of the commissioners, in that case the justices, *Ruffin, C. J.,* says: "A *mandamus* lies only for one who has a specific legal right, and is without any other specific remedy. 1 Chitt. Gen. Pr., 790; *State v. Justices,* 24 N. C., 430. If, in this case, the Sheriff were to refuse to give a license after the Court had made an order for it, the redress would be by *mandamus,* as the specific remedy, as well as by action for the damages; for the party has a positive right to it from the Sheriff. But when we decide that the justices have a discretion, under circumstances, to refuse a license to the relator, although he be a fit person, we, in effect, decide that he cannot have *mandamus.* For it is the nature of a discretion in certain persons that they are to judge for themselves; and therefore no power can require them to decide in a particular way, or review their decision by way of appeal, or by any proceeding in the nature of an appeal, since the judgment of the justices would not then be their own, but that of the Court under whose mandate they gave it."

He cites several cases from the English Courts, showing that they had steadily refused to review or revise a decision based on the discretion or judgment of the justices either by an appeal or by *mandamus* or any other remedial process. Discussing the right of review by an appeal, he refers to *Lord Mansfield* as disclaiming any power to review the reasons of the justices or to overrule the discretion intrusted to them, and as holding that if they were partially, maliciously or corruptly influenced in the exercise of their discretion

and abused the trust reposed in them, they are liable to prosecution by indictment and, possibly, even to a civil action for damages. Again, says the *Chief Justice:* "The distinction between the different methods of proceeding is perfectly intelligible. The *mandamus* will not lie, because by law the justices, with local knowledge, are to judge for themselves, and the judges of a higher court are not to dictate to them. But the indictment will lie, because, although the law allows the justices to judge for themselves, it requires an *honest* judgment, *in subordination to the law,* and punishes a dishonest one, that is, one given in opposition to the known law."

It is settled therefore that the discretion confided to the commissioners is not merely a personal and arbitrary one, and that "they cannot convert the discretion to refuse a license to unfit persons, or, after enough have already been granted, to refuse further applications, into an arbitrary discretion and despotic resolution to grant a license to no person under any circumstances. "There is no arbitrary power that would be felt to be more unreasonably despotic and galling than that under which a small body of Inferior Court magistracy should undertake, upon their mere will, without any plain mandate from the law-making power, to set up their taste and habits as to meat, drink or apparel as the standard for regulating those of the people at large. For ages past sumptuary laws have been abandoned. The Legislature does not affect to assert that policy." 27 N. C., 326 and 321.

But while their discretion is not an arbitrary one, this is far from proving that the Courts can by the writ of *mandamus* coerce the commissioners into exercising that discretion in favor of any particular person or in any particular way. If the case of *Attorney-General v. Justices* decides anything, it certainly decides that a *mandamus* will not be

issued for the purpose of compelling the body invested with the discretion of granting or refusing a license to issue a license to a person whose application has been rejected by them. In that case the justices refused the application upon the single ground that their power to do so was absolute. No stronger case for a *mandamus,* if one can issue in any case, could have been presented, and yet the Court adjudged that, "Because this is not a case for a *mandamus,* the judgment of the Court must be reversed, and the motion for a peremptory *mandamus* is refused."

The case of *Attorney-General v. Justices* was reviewed at some length in *Muller v. Comrs.,* 89 N. C., 171, and was approved. It is true that *Ashe, J.,* who wrote the opinion of the Court, did not refer specifically to the question whether the decision of the commissioners was the subject of review, or whether their discretion could be controlled by *mandamus,* for it was not necessary to do so, as the Court held that the commissioners certainly had a discretion, which in that case was shown to have been properly and legally exercised by them.

In Tapping on Mandamus (Edition of 1853), at star pages 14 and 41, we find it stated generally that *mandamus* will not lie to command the exercise of a discretionary or voluntary act or right of what kind soever, so neither does it lie to influence nor control the exercise of such a discretionary act, power or right. It must, however, be clearly understood that although there may be a discretionary power, yet if it be exercised wrongfully or with manifest injustice the Court is not precluded from commanding its *due* exercise. So when one is to act according to his discretion, and he will not act, nor consider the matter, the Court will by *mandamus* command him to put himself in motion to do it, that is, to hear and determine or to inquire so that he may exercise a considerate discretion. "There is therefore no instance of a

mandamus to compel an 'approval,' but the Court will by its writ compel an inquiry, and in so doing it does not at all interfere with the exercise of such discretion." *Tapping,* star p. 15. "The writ does not lie to command the justices to license a victualler to sell ale, notwithstanding it was suggested that the refusal proceeded from a mistaken view of their jurisdiction, and also notwithstanding a very strong case of partiality was made out, for it is a matter entirely within their discretion. The proper course in such a case is to move for a criminal information, nor does it lie to rehear an application for license which they have refused because of a mistaken notion as to the law." Tapping, p. 41.

The rule is thus stated by another author: "We come next to consider of a fundamental rule underlying the entire jurisdiction by *mandamus* and especially applicable in determining the limits to the exercise of the jurisdiction over public officers. That rule is that in all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, *mandamus* will not lie either to control the exercise of that discretion or to determine upon the decision which shall be finally given. And whenever public officers are vested with power of a discretionary nature as to the performance of any official duty, or, in reaching a given result of official action, they are required to exercise any degree of judgment, while it is proper by *mandamus* to set them in motion and to require their action upon all matters officially intrusted to their judgment and discretion, the Courts will in no manner interfere with the exercise of their discretion, nor attempt by *mandamus* to control or dictate the judgment to be given." High on Extraordinary Legal Rem., p. 50, section 42, *et seq.*

Where discretion had been given to commissioners in selecting and locating a site for the seat of justice for a county, and it was sought by *mandamus* to compel them to change the

location already made, this Court, after stating that the business had been entrusted to the discretion of the commissioners, said: "If the defendants had neglected or refused to execute the power entrusted to them we certainly might call upon them to show cause why they had been so negligent, and upon insufficient return might have issued a peremptory *mandamus*. Here, all we could do would be to command them to select the site for the permanent seat of justice for the county according to law, which, under their oaths, they say they have done." *Hill v. Bonner,* 44 N. C., 257.

In a case similar to the last one cited it was said by this Court that "It may be conceded that they ought to have selected the lot on Coleman's land, but not having done so, and having passed on and made a different selection, the writ will not lie, because it would be but a command to make a different selection from the one which they had thought proper to adopt." *Herbert v. Sanderson,* 60 N. C., 277.

In *Buckman v. Comrs.,* 80 N. C., 126, the doctrine is thus stated: "Upon the commissioners alone devolves the obligation, and upon them rests the responsibility of deciding upon the sufficiency of the bond, and under the penalty of incurring a personal liability as a surety for taking a bond known or believed to be insufficient. We can compel them to proceed and act, but we cannot control or interfere with the honest exercise of their judgment and discretion." That case cites and approves what is said by Tapping and High which has already been mentioned by us. See also *Young v. Jeffreys,* 20 N. C., at p. 221; *State v. Moore,* 46 N. C., at p. 279; *Taylor v. Comrs.,* 55 N. C., at p. 145, 64 Am. Dec., 566; *Railroad v. Jenkins,* 68 N. C., 504; *County Board v. State Board,* 106 N. C., 81. Consulting the English cases we find that there are many in which this precise question has been presented for adjudication. The uniform course

of decisions has been to deny the writ when there is any discretion.

In *Rex v. Justices,* Sayer Rep., 216, *Ryder, C. J.,* presiding in the Court of King's Bench and speaking for the Court upon a rule to show cause why an information for a misdemeanor should not be filed, said: "It has been truly said that the power of licensing public houses is so absolutely in the discretion of the justices of the peace that this Court will never award a *mandamus* for the licensing of a public house; but it is equally true that the abuse of a discretionary power ought to be more severely punished than the abuse of a power which is not discretionary. In the present cases it appears manifestly that the power of licensing public houses was very grossly abused." The rule was made absolute, that is, the refusal, under the circumstances, was held to be indictable but not to present a case for *mandamus.*

In *Rex v. Young,* 1 Burrows, 560, *Lord Mansfield,* sitting in the same Court, made a like ruling and said, "There was no pretense upon any other foot than that of criminality to make a rule upon the justices, who have a discretionary jurisdiction given them by the law. But though discretion does mean and can mean nothing else but exercising the best of their judgment upon the occasion that calls for it, yet if this discretion is wilfully abused it is criminal and ought to be under the control of the Court." He then states that the Court cannot review the reasons of the justices by appeal or by overruling their discretion, but that the control of the Court could be exercised only by an indictment or perhaps by civil action at the instance of the party injured.

The Supreme Court of the United States has frequently had similar questions before it for decision, and has invariably held that when there is discretion *mandamus* will not lie to control or reverse it. In *Gaines v. Thompson,* 7 Wall., 347,

that Court, through *Miller, J.*, said: "The Court could not entertain an appeal from the decision of one of the secretaries nor revise his judgment in any case where the law authorized him to exercise judgment or discretion. Nor can it by *mandamus* act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care in the ordinary exercise of his official duties." (Citing cases.) "It may, however, be suggested that the relief sought in all those cases was through the writ of *mandamus,* and that the decisions are based upon the special principles applicable to the use of that writ. This is only true so far as these principles assert the general doctrine that an officer to whom public duties are confided by law is not subject to the control of the Courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone, and however the Courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control there exists no power in the Courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is that the law reposes this discretion in him for that occasion, and not in the Courts. The doctrine therefore is as applicable to the writ of injunction as it is to the writ of *mandamus.*" To the same effect are *Cox v. U. S.*, 9 Wall., 298, and numerous cases therein cited.

The rule is strongly stated in the recent treatise (Bailey on Jurisdiction, Vol. II, section 572), as follows: "That the writ will not lie to control judgment or discretion which has been reposed elsewhere is a principle of universal recognition. The judgment and discretion thus conferred is personal to

the Court, body or person, and no Court can substitute its own judgment and discretion for theirs."

This Court in *Ewbank v. Turner,* 134 N. C., 77, was required to pass upon the right of the plaintiff to a *mandamus* to compel the defendants, the Examining Board of the State Dental Society, to issue to him a certificate of proficiency so that he could practice dentistry in this State. We denied his right to any such relief by *mandamus, Chief Justice Clark,* for the Court, saying: "The granting a certificate to practice involves matters of judgment and discretion on the part of the board and will not be enforced by *mandamus,*" which "cannot be used as a writ of error to revise and reverse erroneous judgments of a subordinate tribunal, and the Court 'will not and cannot look into the evidence of facts upon which the judgment of the board was based, for the purpose of determining whether the conclusions drawn from it were correctly or incorrectly formed.'" See also, *Wise v. Bigger,* 79 Va., 269.

While there may be authorities to the contrary elsewhere, the result of judicial decision in this State is that the body clothed with the discretion cannot by any process of the Court be compelled to do anything but exercise that discretion—to act in accordance with the law—and while the Court may do this, it has no power or jurisdiction to direct the course the exercise of the discretion shall take in order to bring about any given result. It cannot order a license to issue, but its coercive power is exhausted when it requires them to inquire and decide, by the fair and honest exercise of their judgment, whether the applicant is entitled to license or not.

The next question to be considered is whether the Act of 1903, called in the argument the Watts Law, has changed the law in any material respect so as to render the foregoing principles inapplicable. After a careful examination of that act our conclusion is that it has not, but that it has, in all

material respects, so far as the question now under consideration is concerned; the law in every essential particular is the same now as it was before that act was passed.

The Act of 1903 provides that liquors shall not be sold except in incorporated cities and towns wherein the sale is not now or hereafter prohibited by law, with certain exceptions not applicable in this case. It then provides for an election to be held in any city or town upon certain conditions being complied with, and declares that if a majority of votes be cast in favor of the sale of liquors "the Board of County Commissioners of the county and the governing board of such city or town shall grant license to sell liquors in such city or town to all proper persons applying for the same according to law," the license to be granted until another election reversing the result of the voting; but no person is authorized to sell liquors even when such an election has been held and resulted in favor of the sale of liquors in the city or town "except upon a full compliance with the conditions and requirements which may now or hereafter be imposed by law."

We think it clearly appears from the language of the act that it was not intended to change the method of granting license to sell liquors. The mere fact that there has been a majority of votes cast at an election in favor of the sale of liquors does not make it mandatory upon the commissioners to grant license upon the mere compliance with certain requirements of the act, but it merely authorizes the board to grant license under the general law, when, if there had been an unfavorable vote, they could not do so. They have now the same discretion that they had before the act was passed. The words "shall grant license" used in the act, do not withdraw from the board the discretion it had under the general law, but was intended simply to confer authority which should be exercised in strict subordination to the gen-

eral law. This is so on principle and authority, as we think. A statute will not be construed to repeal or even to modify another statute unless the intention so to do appears, or unless such a construction is required on account of a conflict between the provisions of the two statutes, but if they can be reconciled so that both can have effect this will be done, as that is presumed to have been the intention. There is everything in this statute to show that the intention was as we have above stated it to be. There is no conflict, and the two acts may well stand together and have full force and effect in every part of each of them.

But the question as to the true interpretation of the act has, it seems to us, been virtually decided by this Court in a case presenting facts substantially the same as those in the case at bar.

In *Comrs. v. Comrs.,* 107 N. C., 335, an election had been held in the town of Maxton, under and by virtue of the provisions of sections 75 and 76 of chapter 25 of the Private Acts of 1887, to determine whether liquors should be sold in that town. The act provided that if the majority of the votes be "for license" then the commissioners *shall* grant license, but not otherwise. It was contended in that case, as it is now contended in this, that these were words of command, but this Court held that they did not change the law in respect to the discretion of the commissioners under the general act. The case is directly in point, and must control in the construction of the Act of 1903. Indeed, no two cases could be more alike in respect to the precise question presented in each. But if we did not have the authority of that case to support our ruling, we would not hesitate to hold upon other considerations than those already stated that the Act of 1903 clearly did not, and was not intended to, change the law so as to require the commissioners to issue license without exercising their discretion, when

a majority of the votes cast at any election held in accordance with its provisions were in favor of the sale of liquors. Section 2 of the act makes it unlawful for any person to sell liquors in any incorporated town without first obtaining a license as provided by law, both from the county and town commissioners, and even when a favorable vote has been cast at an election held under the act an application must be made "according to law," and there must be "a full compliance with the conditions and requirements which may now or hereafter be imposed by law" (section 11), and by section 66 of the Revenue Act (Acts 1903, chapter 247) it is further provided that "in such towns and cities where the qualified voters shall hereafter, under a special act of the General Assembly, vote in favor of license, then the County Commissioners shall grant an order to the Sheriff to issue license subject to all the provisions of this section," one of which provisions is that upon application duly made, and a full compliance with the requirements as therein stated, "the commissioners *may* grant an order to the Sheriff to issue such license (italics ours). Even if the word "shall" had been used throughout, instead of the word "may," we have seen that it would have reposed a discretion in the commissioners. (*Attorney-General v. Justices, supra,* and *Muller v. Comrs., supra*). It is interesting to note the varying phraseology used in the statutes concerning the sale of liquor, denoting perhaps the fluctuations of public sentiment upon this question. The law as contained in the Revised Statutes and the Revised Code, which was construed in the cases of *Attorney-General v. Justices* and *Muller v. Comrs.,* remained as it was there written without any substantial alteration until by the Act of 1893, chapter 294, section 33, it was changed so as to read: "Upon the filing of such application and affidavit, the commissioners shall, without the exercise of discretion, grant an order to the

Sheriff to issue such license." And this continued to be the law until by the Act of 1897, chapter 168, section 34, the words "without the exercise of discretion" were stricken out, and the words "may grant" substituted for the words "shall grant." Whether this change in the form of expression was intended to confer upon the commissioners an absolute discretion, that is, a larger discretion than they before had, as contended by defendant's counsel, we will not undertake to decide, as it is not necessary to do so in order to dispose of this appeal. It is sufficient for us now to hold, as we do, that the commissioners still have a discretion to grant or refuse license, and, while this discretion must be exercised in a manner fair, candid and unprejudiced, and not arbitrary, capricious or biased, much less warped by resentment or personal dislike, it cannot be controlled by *mandamus*. The Court can only insist on a conscientious judgment being used in the exercise of the power of choosing or rejecting, but cannot itself exercise the power nor substitute its own conscience for that of the board, or its own sense of fitness for the approval or disapproval of that other tribunal, for to do so would be in direct violation of the statute. In passing upon the question whether they will or will not grant a license, "they have," in the language of this Court, "a limited legal discretion, and may consider all questions and matters which pertain to the welfare of the community." *Mathis v. Comrs.*, 122 N. C., 416. But this does not mean that they may use this discretion for the purpose of advancing or vindicating their own views or opinions upon the general policy of selling liquor. This policy has been settled by the decision of the Legislature and the vote of the people to which they must yield a ready obedience, and the discretion must therefore be exercised by them in strict submission to this declared policy, and with a scrupulous regard to the right of the applicant to have a

fair and impartial hearing, and a just decision, whether for him or against him, and, subject to those limitations, they are a law unto themselves.

Counsel for the plaintiff in their well-prepared brief urge upon our attention the case of *Loughran v. Hickory*, 129 N. C., 281, as an authority sustaining the ruling of the Court below, but we do not agree with the counsel. In that case the Court distinctly recognizes the right of the board, in the exercise of its discretion, to pass, not only upon the fitness of the applicant and the suitableness of the place, but also upon "other matters which might possibly arise." Surely the Court in that case did not intend to overrule *Attorney-General v. Justices*, *Miller v. Comrs.*, and the other cases holding that the commissioners had a discretion which could not be taken from them by *mandamus*, without even referring to those cases. We rather think that in that case the Court intended to adhere to its previous decisions upon the same question.

One question still remains to be considered: Was the particular judgment rendered by the Court erroneous in any view of the case. We think it was, even if the Court could control the discretion of the commissioners. In the first place, the Court required the board simply to find whether the building is suitable, and upon the finding that it is commands the board to issue license upon the payment of the tax, and if after hearing testimony as to the suitableness of the building they refuse or fail to make an order for the license to issue, then to show cause why a peremptory writ of *mandamus* should not issue. The judgment of the Court is based entirely upon the theory that after finding that the applicant is a fit person, and that the building is suitable, and the other recited facts, the commissioners have no discretion left in the matter. This is an error, for the statute expressly provides that even when those facts are found the

commissioners *may* grant license, and not that they *must* do so. If it had been intended to take away from them all discretion upon such a finding the Legislature would have used not merely a word importing permission or one implying the exercise of a discretion, but a word of command. It was therefore in contravention of the statute thus to deprive them of their right to exercise that discretion. In the second place, the defendants have made a full and frank avowal in their answer of what they did in passing upon the application, and they aver that each application was fully and fairly investigated and carefully considered by them, and that they refused to grant the order for the license to issue to the plaintiff in the exercise of the sound legal discretion vested in them by the law. It appears from the answer that the defendants have done their full duty in the premises.

The *mandamus* act (The Code, section 623) provides that when an issue of fact arises before the Judge who has jurisdiction in a case like this, which is not brought for the enforcement of a money demand, it shall be the duty of the Court, upon the motion of either party, to continue the action until said issue of fact can be tried by a jury. The plaintiff did not see fit to avail himself of this provision of the law but elected rather to move, upon the pleadings and the admission of the defendants that plaintiff is a proper person to sell liquors, for a *mandamus*. This was in the nature of a demurrer *ore tenus* to the answer, which involves the admission of the facts set out in the answer. The plaintiff had the right to adopt this course, but he must, in this Court, be held to the course he saw fit to pursue in the Court below, and this was the view taken by the Judge as to the effect of plaintiff's motion, for it was held that, notwithstanding the averments of the answer, the plaintiff was entitled to a *mandamus* if it was found by the board that the proposed place of sale is a suitable one. In *Comrs. v. Comrs.*, 107

N. C., 335, a similar answer was filed and the plaintiff demurred to the answer. The demurrer was overruled and the action dismissed, and that ruling was affirmed by this Court. There is no difference in principle in such a case as this between a demurrer to the answer and a motion for judgment upon the answer, which, as we have said, is a demurrer *ore tenus*. In *Attorney-General v. Justices, supra,* the plaintiff filed his petition for a *mandamus* and an alternative writ was issued. The return to the writ was not traversed by the plaintiff, but he moved for a peremptory writ upon the ground that the return or answer to the alternative writ, which merely stated that the justices had refused to grant a license to any person, although plaintiff was admitted to be a proper person, was insufficient and entitled him to a license if one were to be granted at all; but the Court refused to issue the writ and dismissed the action with costs against the plaintiff. When, as in this case, the plaintiff moves for judgment upon the pleadings, and introduces no evidence to sustain the allegations of his complaint, we must, under the *mandamus* act, necessarily assume the facts to be as stated in the answer and, upon those facts, we now adjudge that the plaintiff is not entitled to the writ of *mandamus,* and the case must therefore be remanded with directions to dismiss the action.

Error.

DOUGLAS, J., dissenting.

GRAVES v. COMMISSIONERS.

(Filed April 12, 1904).

1. CONTRACTS—*Statutes—Bonds—Acts 1885, ch. 215—Const., Art. 2, sec. 14.*

Prior to November 1, 1886, it had not been decided that an act ratified by the presiding officers of the general assembly was conclusive evidence that the same had been passed in accordance with the constitution.

2. BONDS—*Railroad Securities—The Code, sec. 1996—Burden of Proof.*

Where the recitals in railroad bonds are that they were issued under a particular act of the legislature, the burden of validating them as made under sec. 1996 of The Code is on the party alleging their validity.

3. RAILROADS—*Bonds—County Commissioners—The Code, sec. 1996.*

The Code, sec. 1996, does not authorize the county commissioners to issue bonds in aid of the "construction" of a railroad not yet begun.

4. RAILROADS — *Bonds — Townships — County Commissioners — The Code, sec. 707, subsec. 14—The Code, sec. 1996.*

The county commissioners are not authorized to issue bonds on the credit of a township for the construction of a railroad.

5. BONDS—*Railroads—Taxation.*

A tax payer may enjoin county commissioners from making a tax levy to pay interest on railroad bonds issued under an unconstitutional statute, without restoring to the *bona fide* holders of the bonds the consideration paid therefor.

ACTION by G. C. Graves and others against the Board of Commissioners of MOORE County, heard by *Judge M. H. Justice*, at Chambers, in Carthage, November, 1903.

The Carthage Railroad Company was chartered by chapter 215, Laws of 1885. By section 7 of said act the Com-

missioners of Moore County, or any township through which said railroad might pass, were authorized to subscribe to its capital stock such an amount as, upon a vote at an election to be held as in said act provided, should be named. The said commissioners upon taking such vote were authorized to issue bonds for the purpose of borrowing money to pay such subscriptions as might be made pursuant to the provisions of said act. The commissioners were authorized to levy taxes to pay the interest on such bonds and to provide a sinking fund to pay the principal. The bill constituting said act was not passed, either in the Senate or House of Representatives, in accordance with the provisions of section 14, Art. II of the Constitution, in that the names of the senators and members voting for and against said bill were not recorded on the journals. The commissioners, in accordance with the provisions of said act, caused an election to be held in Carthage Township in said county in regard to subscribing $10,000 to said railroad, at which a majority of the qualified voters voted for said subscription. Pursuant thereto the commissioners issued the bonds of said township to the amount of $10,000. Said election was held between March 4, 1885, and November 1, 1886. The said bonds were in proper form and attested according to law. They were put upon the market, sold and purchased in good faith for their full value, and without any notice, express or implied, to the purchasers, of any infirmity therein except such facts as appeared upon the record on the journals of the Senate and House and of this the purchasers had no actual notice. The money derived from the sale of said bonds was spent in the construction and equipment of said railroad extending through said Carthage Township. The stock of said company to the amount of ten thousand dollars was issued to the Board of Commissioners for the benefit of Carthage Township, and is now held by said board for said

township, and the people of said township have enjoyed and continue to enjoy the benefit of said railroad. The defendant Board of Commissioners have each year since the issuance and sale of said bonds levied a tax upon the taxable property in Carthage township sufficient to pay the interest on said bonds and have paid such interest, and that it is the purpose of said board, at the meeting on the first Monday in June, to levy a tax upon the property and polls in said township for the purpose of paying the interest on said bonds accruing during the year 1903; they will levy said tax unless restrained, etc.

The bonds contain the following recital: "This bond is issued by virtue of an act of the General Assembly of North Carolina, ratified March 4, 1885, chapter 215, and by authority of an election held in Carthage Township in pursuance thereof, ratifying the same, etc."

The defendant board in apt time requested the Court to find from the affidavits the following facts: "That when the said bonds were issued and sold November 1, 1886, they were valid by the laws of North Carolina as then expounded by all the departments of the government and administered in its courts of justice. That said bonds were issued and sold prior to the decision in the case of *State v. Patterson*, 98 N. C., 660, and prior to the decision of said case every decision of the Supreme Court of said State had been in favor of the validity of said bonds and the act of the General Assembly under which they purport to be issued. That said bonds were sold for value and in good faith, and are now owned by the Jacob Tome Institute of Baltimore, not a party to this suit. That the validity of said bonds cannot be impaired by the decision of the Courts of the State made subsequent to the issue and sale of the bonds."

The Court declined to find said facts and to hold as requested, and the defendant excepted.

His Honor being of the opinion that chapter 215, Laws of 1887, had never been passed in accordance with the provisions of section 14, Article II of the Constitution, was invalid, and that the election held pursuant thereto and the bonds issued by authority thereof were void, enjoined the defendant Board of Commissioners from levying the tax to pay interest or principal of said bonds. The defendant appealed.

H. F. Seawell and *W. J. Adams,* for the plaintiffs.
U. S. Spence, for the defendant.

CONNOR, J. The defendant concedes that his Honor's ruling in respect to the invalidity of chapter 215, Laws 1885, is sustained by the decisions of this Court in *Bank v. Comrs.,* 119 N. C., 214; *Comrs. v. Snuggs.* 121 N. C., 394, 39 L. R. A., 439; *Rodman v. Washington,* 122 N. C., 39; *Comrs. v. Payne,* 123 N. C., 432; but contends that said bonds are valid under the decisions of the Supreme Court of the United States in *Comrs. of Wilkes v. Coler,* 190 U. S., 107, and *Comrs. of Stanly v. Coler,* 190 U. S., 437. They say that prior to the passage of the Act of 1885, chapter 215, and the issuance and sale of the bonds, November 1, 1886, every decision of this Court construing the Constitution tended to establish the principle that when an act had been ratified and signed by the presiding officers of the Senate and House of Representatives, it was conclusive evidence that the bill had been passed in accordance with all of the provisions of the Constitution. That purchasers of bonds issued pursuant to such act are presumed to have contracted with reference to such decisions and that they entered into and became a part of the contract. That to hold the bonds issued in pursuance of such acts invalid, in the light of such decisions, impairs the obligation of the

contract, etc. If the premise be true the conclusion must be conceded. The principle is well settled by numerous authorities and commends itself to the judicial mind.

This identical question, however, is decided by the Supreme Court of the United States in *Wilkes Co. v. Coler,* 180 U. S., 506. The Circuit Court of Appeals, under the judiciary act of 1891, certified to the Supreme Court three questions, two of which were: (1) Whether, if the bonds and coupons in question were issued, put in circulation and came into the hands of purchasers for value and without notice in due course of trade, and if there were at that time no decisions of the Supreme Court of North Carolina adverse to these bonds, or bonds issued under similar statutes, they are valid, etc. (2) Whether there was any decision adverse to the validity of these or other identical bonds, or any construction of the Constitution or law of North Carolina which affected the question of their validity. *Mr. Justice Harlan,* for the Court, proceeds to examine the cases relied on by the bondholders to sustain their contention, being the same cases relied on by the defendant herein. *Broadnax v. Groom,* 64 N. C., 244; *Gatlin v. Tarboro,* 78 N. C., 119; *Scarborough v. Robinson,* 81 N. C., 409, all of which were decided prior to November 1, 1886. The learned Justice carefully analyses these cases and comes to the following conclusion: "It thus appears that no one of the cases cited by the defendant involved a construction of Article II, section 14, of the State Constitution. Those cases arose under other provisions of the Constitution." The question is so fully discussed, and the conclusion so clearly stated, that we think it unnecessary to do more than refer to the opinion in that case." This Court has since the decision of those cases kept the distinction between acts of ordinary legislation and acts coming within the provision of Article II, section 14, of the Constitution clearly in view.

Bank v. Comrs., 119 N. C., 214; *Carr v. Coke,* 116 N. C., 223 28 L. R. A., 737, 47 Am. St. Rep., 801; *Wilson v. Markley,* 133 N. C., 616. The distinction was clearly defined in *Bank v. Comrs., supra.*

2. The defendant says that if the bonds are not valid under chapter 215, Laws of 1885, that the commissioners had power and authority to order the election, and pursuant thereto to issue the bonds under section 1996 *et seq.* of The Code, which provides that "The Boards of Commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest." This Court in *Comrs. v. Snuggs,* 121 N. C., 394, discussed and decided this identical question, holding that the extent of power conferred upon the commissioners by section 1996 of The Code was confined by the express language used *"to aid in the completion of any railroad,* etc." This view was reaffirmed in *Comrs. v. Call,* 123 N. C., 308, 44 L. R. A., 252. The defendant says this construction was repudiated by the Supreme Court of the United States in *Stanly Comrs. v. Coler,* 190 U. S., 437, and by the Circuit Court of Appeals in *Comrs. of Stanly Co. v. Coler,* 113 Fed. Rep., 705. It is true that these Courts held that while the general rule required the Federal Courts to accept the construction put upon State Constitutions and State statutes by the Courts of the State there were exceptions thereto, and that the case presented one of such exceptions; citing *Burgess v. Seligman,* 107 U. S., 20. The Federal Courts rejected the construction put by this Court upon the word "completion," holding that, read in the light of the context, it was to be construed as synonymous with "*construction.*" We have examined with care the opinions of the learned Judges and the reasoning advanced to sustain their views. We are constrained, with all possible

deference, to say that we find in them no reason advanced which causes us to change the view expressed by this Court. We do not find it necessary to follow this discussion, because in our opinion section 1996 cannot, in any point of view, be called in aid of the bonds involved in this case. It will be observed that authority is given "Boards of the several counties" to subscribe, etc. The subscription here is made by Carthage Township, and certainly no power is given by The Code for townships to make such subscriptions otherwise than by a special act of the General Assembly. It is expressly provided that "No township shall have or exercise any corporate power whatsoever unless authorized by an act of the General Assembly to be exercised under the supervision of the Board of Commissioners." The Code, chapter 17, section 707, subsection 14. While it is true, as contended, that the County Commissioners as the governing board of the county by the terms of chapter 215, Laws of 1885, represents and directs the action of the township in respect to the subscription, etc., it will hardly be seriously contended that they may, under the terms of section 1996 of The Code, submit the question of issuing bonds to the people of the township except by positive direction of the General Assembly. These bonds expressly recite upon their face that they "are issued by virtue of an act of the General Assembly ratified on the fourth day of March, 1885 (chapter 215), and by authority of an election held in Carthage Township in pursuance thereof, ratifying the same, the purpose and intent of which is to raise a fund sufficient to pay the subscription of said Carthage Township to the capital stock of the Carthage Railroad Company for the construction and equipment of the same." It would be difficult to use stronger terms in which to set forth the subscription to the road and the purpose for which it was made; "for construction and equipment of the same" expressly excludes any idea

that the people of Carthage Township, or the commissioners of the county, supposed that they were subscribing "to aid in the completion" of a railroad. We therefore conclude that, even if we were to adopt the interpretation placed upon the statute by the Supreme Court of the United States, which we cannot do, these bonds would not come within the protection of section 1996 of The Code. Again, much emphasis is laid by *Mr. Justice McKenna* in the Stanly bond case upon the fact that there the bonds expressly recited that they were issued pursuant to the provisions of section 1996 *et seq.* of The Code. Purchasers were justified therefore in assuming that all provisions and conditions, the performance and existence of which are necessary to authorize the issuing of the bonds, had been complied with and existed—citing *School District v. Stone,* 100 U. S., 183, wherein it is said that "When a statute confers power upon a municipal corporation upon the performance of certain precedent conditions to execute bonds in aid of the construction of a railroad, * * * and imposes upon certain officers invested with power to determine whether such conditions have been performed, recitals that the bonds are issued pursuant to or by authority of the statute have been held in favor of a *bona fide* purchaser for value to import full compliance with the statute and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued." This well-settled principle can have no application here because there is not the slightest reference to The Code or any statute other than chapter 215, Laws of 1885, as the authority under which the bonds were issued. If the power was vested in the Commissioners of Moore County to submit to the voters of Carthage Township the proposition to make the subscription, and it was so recited in the bonds, such recitals in the hands of *bona fide* purchasers for value would be conclusive evidence that the conditions upon which the

authority to issue them could be exercised; but the recitals could not create or confer the power if there was an absolute want of it. Every purchaser of the bonds would take them with notice of that fact. *Wilkes v. Coler,* 190 U. S., 107. His Honor finds as a fact that the election was held under the provisions of the Act of 1885, chapter 215, and expressly declines to find that said election was held pursuant to the provisions of sections 1996, 1997. There being no evidence in the record tending to show that the provisions of section 1997 in regard to ordering and holding the election were complied with, and no finding of fact to that effect, and no recitals in the bonds that they were issued pursuant to or by authority of said sections, it is difficult to perceive how we could say either that they were so issued, or if so issued that the provisions of the sections were complied with. On the contrary we can see from the facts found and the recitals that the election was held pursuant to chapter 215 of the Laws of 1885. Section 12 of said act prescribes the preliminary steps to be taken before an election can be held, that twenty-five tax payers petition in writing that an election be ordered, etc. The recital in the bonds conclusively fixes the fact that such steps were taken and all things necessary were done in respect to the election. *Stanly Bonds case, supra.* It is difficult to see how the same recitals can conclusively fix the fact that the bonds were issued pursuant to and in compliance with another statute, the terms and provisions of which, in regard to the preliminary steps to be taken, are entirely different. The burden is upon the defendant to show that although void under the act recited in the face of the bonds they are valid under some other statute, and to show further that all things necessary to be done under such statute were done, which is practically to contradict the recitals. We conclude that no power is conferred upon the commissioners by section 1996 of The Code to submit to

the people of a township the question of subscribing to a railroad. That in the absence of any such power his Honor correctly declined to find the fact that the commissioners undertook to order the election under said section. To have so found would have been error because there was no evidence thereof, on the contrary the record expressly showed the contrary. The defendant says that the plaintiff has no standing in a court of equity; that before he as a tax payer can invoke the equitable aid of the Court he must offer to restore to the holders of the bonds the proceeds or the property received in consideration thereof. It is well settled that a tax payer may maintain a bill to enjoin the collection of an illegal tax or a tax levied for an illegal purpose. If the bonds are absolutely void a tax levied to pay them would be equally so. No estoppel can grow out of a void act of the General Assembly or any act done by authority thereof. If the bondholders are so advised we can see no reason why they may not make themselves parties and assert their right to the stock now held by the commissioners in trust for the township. The plaintiff simply asks that a tax levy be enjoined. We pass upon the legal aspects of this record without regard to the moral element involved. Certainly this Court does not sympathize with repudiation of public obligations, but our duty is to construe the Constitution and laws of the State. Suitors must look to other tribunals, either their own consciences or the judgment of an enlightened public conscience, to find vindication for their actions. We deem it not improper to say that we commend the action of the defendant Board of Commissioners in defending the rights of the holders of the bonds and setting up in the strongest possible view the grounds upon which, if at all, the bonds could be sustained. The case was well argued and the briefs well and carefully prepared. The defendant contends that the injunction should not have been

made perpetual, but in any point of view only continued to the hearing. The order may be so modified, to the end that any other parties in interest may, if so advised, come in and litigate their rights. The judgment is

Modified and Affirmed.

GUANO CO. v. MARKS.

(Filed April 12, 1904).

1. NEGOTIABLE INSTRUMENTS—*Payment—Burden of Proof.*

Where a party admits the execution of a note, the burden of showing payment is on the payor.

2. NEGOTIABLE INSTRUMENTS—*Receipts—Payments—Evidence.*

In an action on a promissory note, a receipt from the payee to the payor, not referring to any particular debt, is some evidence of payment, there being no evidence of any other indebtedness between the parties.

ACTION by F. S. Royster Guano Company against W. A. Marks, heard by *Judge Walter H. Neal* and a jury, at July Term, 1902, of the Superior Court of STANLY County. From a judgment for the plaintiff the defendant appealed.

R. L. Smith and *R. E. Austin,* for the plaintiff.
Z. B. Sanders, for the defendant.

MONTGOMERY, J. This action was a consolidation of two appeals by the plaintiff from two judgments of a justice of the peace. On the trial below the plaintiff introduced in evidence three promissory notes executed by the defendant to the plaintiff on April 10, 1900, each in the sum of one

hundred dollars and payable one day after date. The defendant admitted the execution of the notes and offered in evidence a receipt in the nature of a letter written from Norfolk, Va., to him by the plaintiff, dated on November 19, 1900, in the following words and figures:

"We beg to acknowledge the receipt of yours of 19th enclosing check for $103, for which you will please accept our thanks"; and also another receipt by way of a letter in the precise words and figures of the first, except that it was dated November 26th, and referred to the receipt of the $100 check as having been sent by the defendant on the 24th. It appears from the record that the plaintiff objected to those receipts but it does not appear upon what grounds, and his Honor then remarked that he would permit the defendant to tender these receipts and see if he would make them competent later on by showing what debts those remittances were to be applied to by agreement of the parties. The defendant thereupon closed his case. His Honor then intimated that he would charge the jury that if they believed the evidence they would allow the plaintiff the full amount demanded according to the face of the notes. Upon that intimation the defendant moved to reopen the case; the motion was overruled and the Court instructed the jury that if they believed the evidence the first issue, "Is the defendant indebted to the plaintiff?" should be answered "Yes," and the second, "If so, in what amount?" "$325.55," with interest.

We think there was error in the proceedings. There was no evidence of any transaction between the parties except the indebtedness above set forth, and the receipts bear dates subsequent to the maturity of the notes sued upon. Those receipts therefore, in our opinion, furnish some evidence tending to show payment upon the indebtedness and they were competent for that purpose. They should have been

admitted without putting the defendant upon the further proof that the credits were not made as part payments on other indebtedness of the defendant if such existed. When the defendant admitted the execution of the notes the *onus* of proving payment was put upon the defendant. The evidence offered by him for that purpose was sufficient to have been submitted to the jury to show that the amounts mentioned in the receipts had been applied to the payment of the notes. In his instructions to the jury his Honor considered that the receipts furnished no evidence of payment, but we are not of that opinion. In a memorandum attached to the statement of the case on appeal his Honor, in explanation of his ruling on the question of evidence, stated that he would in his discretion have reopened the case, but upon an investigation of the facts he was of the opinion that the receipts tendered had been mutilated, that they were to be applied to other indebtedness of the defendant to the plaintiff, and that those parts of the receipts showing that fact had been detached from the receipts. Those facts, which his Honor found upon investigation, showing a mutilation of the receipts, ought to have been submitted to the jury in order that they might pass upon the fact as to whether the amounts mentioned in the receipt should have been credited upon the debts sued upon.

New Trial.

COMMISSIONERS v. PACKING CO.

(Filed April 19, 1904).

1. STATUTES—*General Assembly—Evidence—The Code, sec. 2867.*

The journals of the general assembly are conclusive evidence as to the passage of an act and cannot be contradicted by entries made on an original bill.

2. BURDEN OF PROOF—*Statutes—Evidence.*

The burden of proving that a statute was not passed in accordance with the constitution is on the person alleging its invalidity.

3. TAXATION—*Corporations—Foreign Corporations—Acts 1901, ch. 91.*

Acts 1901, ch. 91, levying an annual franchise tax on corporations is lawful and applies to foreign corporations doing business in this state.

4. FINDINGS OF COURT—*Judge—Appeal.*

A finding of facts by the trial judge by consent of parties is conclusive on appeal where there is any evidence to sustain the same.

ACTION by the State and Commissioners of New Hanover County against the Armour Packing Company, heard by *Judge Geo. H. Brown,* at October Term, 1903, of the Superior Court of NEW HANOVER County.

This action was brought to recover license taxes alleged to be due by the defendant to the plaintiffs under section 91 of the Revenue Act of 1901. A jury trial was waived, and the Court found as facts that the defendant is a corporation of the State of New Jersey with a capital stock of one million dollars, and was engaged during the years 1901 and 1902 in the business of selling, dealing in and distributing meats, canned goods and other articles of trade at wholesale in this State, with its principal office at Wilmington and three offices at other places in this State, all office reports

being sent directly to Kansas City. That license taxes under said section were duly levied by the proper authorities of New Hanover County for the years 1901 and 1902, and a demand made upon the defendant for the payment of the same and a similar demand also made by the State for its taxes for those years, but payment was refused. That the Revenue Act of 1901 appears by the Senate and House Journals to have been read, as a whole, on three several days in each house of the General Assembly, and the ayes and noes were entered on the journals upon the second and third readings. That the bill was amended in the Senate, it appears in the journal, as to several sections, but there is nothing in the entries on the journal to show that section 91 was one of the sections so amended. The defendant introduced in evidence the original bill filed in the State Librarian's office, and from the entries therein it appears that the bill was amended in the Senate by inserting in what was section 88, between the word "corporation" and the word "railroad," the words "organized under the laws of this State," and that section 85 as thus amended became section 95, and that thereafter section 95 was amended by inserting after the word "State" and before the word "railroads" the words "or doing business in this State," and by adding to the section the words "provided further, that the tax provided for under this section shall be payable in the county of this State where it has its principal office." That said amendments were reported from a committee of conference and concurred in without a vote on three several days and without entering the ayes and noes on the journals, and section 95 was then numbered 91. That the defendant has paid the taxes due under section 66 of said act and imposed upon all agents of packing houses doing business in this State. No point was made in the Court below as to the

joinder of the plaintiffs, the State and the county, in one action. 112 N. C., 34.

The Court gave judgment for the plaintiffs and the defendant appealed.

George Rountree and *J. O. Carr,* for the plaintiffs.
J. D. Bellamy, for the defendant.

WALKER, J., after stating the case. The contentions of the defendant in this case relate to the validity and the interpretation of section 91 of the Revenue Act, it being chapter 9 of the Acts of 1901, and are as follows: (1) That section 91 was not passed in accordance with the provisions of the Constitution, Article II, section 14, as the said section was amended after the original bill had passed its several readings in each House by the insertion of the words "or doing business in this State," and of the proviso, which is as follows: "Provided further, that the tax provided for under this section shall be payable in the county of this State where it has its principal office." And that after the bill was thus amended it was not read three several times in each house, nor were the ayes and noes on the second and third readings entered on the journal, as required by the said article and section of the Constitution. (2) That neither the State nor any county thereof can collect the tax, because section 91 of the Revenue Act of 1901 applies only to corporations organized under the laws of this State, and (3) That even if the State can collect the tax under section 91 of said act no county can do so, as it is a tax on the franchise of the corporation, and not a license or privilege tax, and the act confers no authority upon a county to collect such a tax.

We will consider these propositions in the order above stated.

In the Constitution of the State, Article II, section 14, it is provided "that no law shall be passed to impose any tax upon the people of the State, or to allow the counties to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days and agreed to by each house respectively, and unless the ayes and noes on the second and third readings of the bill shall have been entered on the journal."

Assuming, for the sake of the argument, that the defendant, a non-resident corporation and not a citizen of this State, can avail itself of any non-compliance with the provisions of that section (which by its terms applies only to a law imposing a tax upon the people of the State) for the reason that it is entitled to the rights and privileges of the citizens of this State or to the equal protection of its laws (*Blake v. McClung,* 172 U. S., 239), and assuming further that the section embraces an amendment to a bill, as well as the bill itself, if it is a material one and imposes a new tax or increases a tax already provided for in the bill, we do not think that the defendant has succeeded in showing that the bill was not passed in strict accordance with the provisions of that section, or that any amendment to the bill imposing the license taxes which the plaintiffs seek to recover in this case was passed without a compliance with the requirements of the Constitution as contained in that section. The Judge below found the facts by consent of the parties, a jury trial having been expressly waived, and any decision we may make must have reference to those facts as found and set out in the case and can rest on them alone. We are not at liberty to consider any extraneous facts or any evidence of such facts nor any facts, even if they have been agreed upon, provided the law forbids them to be used for the purpose of rebutting the presumption of regularity

arising from the ratification of the act, nor can the defendant show in any other way, or by any other evidence than that which the law says shall be the only kind of proof, the fact that the requirements of the Constitution were not observed. The Judge finds "that the Revenue Act of 1901 appears by the Senate and House Journals to have been read as a whole on three several days in each house of the General Assembly, and that the ayes and noes were entered on the journals upon the second and third readings." It is true he further finds that the bill, after it passed the House, was amended in the Senate, the amendments affecting about thirty sections of the bill; that a conference committee was appointed, and that its report, recommending that the House concur in a large number of the Senate's amendments and that the Senate recede from certain of its amendments, was adopted, and that the bill as thus amended was not read upon three several days in each house, nor were the ayes and noes entered upon the journals on the second and third readings. But it nowhere appears by any competent proof or by the admission of facts which we can consider, that any of those amendments were of such a kind as to require them to be passed in the manner provided in Article II, section 14, of the Constitution, if that section applies to amendments to a bill, which it is not now necessary for us to decide.

We have, then, the ratification of the bill, which imports that it has become a law in due course of procedure, and its authentication as a bill that has passed the proper legislative body is complete and unimpeachable (*Scarborough v. Robinson,* 81 N. C., 409; *Carr v. Coke,* 116 N. C., 223, 28 L. R. A., 737, 47 Am. St. Rep., 801; *Field v. Clark,* 149 U. S., 649; *Paughbom v. Young,* 32 N. J. Law, 29; *Wilson v. Markley,* 133 N. C., 616), unless the Constitution requires that it should be passed in a certain way which must appear

in the journals, in which case reference may be had to the journals as evidence in the Court below to determine whether it passed in that way. *Bank v. Comrs.,* 119 N. C., 214. We have the further fact, which was found by the Judge, that the bill was read "as a whole" on three several days in each house, and the ayes and noes on the second and third readings duly entered on the journals. In order to show that this tax was imposed by an amendment in the Senate, the defendant asks us to consider the facts found by the Judge as to the entries on the original bill which is filed in the State Librarian's office. This we are not permitted to do, although it may appear therefrom that such an amendment was adopted without compliance with Article II, section 14. The Constitution requires that it should appear, not from the entries on the original bill, but from the journal, that the bill was properly read and that the necessary entry of the ayes and noes was made. If the journal shows that the bill was regularly passed, no evidence will be received to contradict what is therein recorded. The law requires the journals of the General Assembly to be deposited with the Secretary of State (The Code, section 2867), and these journals, or a copy of them, certified as provided by law, are the only evidence that can be resorted to in order to overcome the presumption arising from the ratification of the act and to invalidate it. It can be done in this way, but in no other. If it does not appear in the journals that the bill has been passed as required by Article II, section 14, the act is invalid, and if it appears that it has so passed then it is valid. In neither case can the journals be contradicted by extraneous proof.

In *Gatlin v. Tarboro,* 78 N. C., 119, this Court, by *Rodman, J.,* in discussing the necessity of proving that thirty days' notice of the application to pass a private bill had been given, says: "We cannot accept the agreement of the

parties that no notice was in fact given, as proof that it did not appear to the Legislature that the required notice had been given. In such a case the best and only proof is by the record. Our opinion on this point is supported by a recent decision in Illinois (*Happel v. Brethauer*, 70 Ill., 166, 22 Am. Rep., 70). If any weight were allowed to admissions of this sort, the law might change as each case was presented." In the case of *Happel v. Brethauer*, just cited, the Court held that if the Constitution had not been complied with in the passage of a bill the fact must be shown by reference to the journals, and the Court says "In no other mode can we be properly advised." In *Osborne v. Staley*, 5 W. Va., 85, 13 Am. Rep., 640, it was held that, on a question touching the validity of an act, the Court can look beyond the authentication of the act to the journal of either branch of the Legislature to see if the bill passed by the required number of votes and that the legislative declaration upon that question is conclusive. In *Wise v. Bigger*, 79 Va., 269, where a learned discussion of the question will be found, the Court held that the Constitution required a journal to be kept of the proceedings of the Legislature and that journal showed that the bill then under consideration had passed by the requisite majority. "In the face of the solemn record," says the Court, "in which the Senate certifies its proceedings in a matter of fact relating to its own conduct—in the apparent performance of its legal functions—this Court is asked to inquire into or to dispute the veracity of the certificate. To do this would be to violate both the letter and the spirit of the Constitution; to invade a co-ordinate and independent department of the government, and to interfere with the separate and legitimate power and functions of the Legislature." In 1 Greenleaf on Evidence (16 Ed.), section 491, we find it stated that "the journals of either house are the proper

evidence of the action of that house upon all matters before it." To the same effect are the following authorities: Cooley's Const. Lim. (7 Ed.), p. 201; Black's Const. Law, 60; Ordronaux's Const. Lim., 382; *Happel v. Brethauer,* 70 Ill., 166; *Attorney-General v. Rice,* 64 Mich., 385; *Detroit v. Wentz,* 91 Mich., 78, 16 L. R. A., 59; *White v. Hinton,* 17 L. R. A., 66; Op. of Justices, 52 N. H., 622. In *State v. Smith,* 44 Ohio St., 348, it is said: "There are two rules in this country as to what evidence is admissible to authenticate the passage of a statute. One is according to the English doctrine, which is that it is not competent to go behind the parliamentary rolls; the other is, that it is competent to go behind the enrollment of the statute to the journal. There is no sanction or authority for receiving evidence beyond the enrollment and the journal; and these records are conclusive and binding upon the Courts." Numerous cases decided in this country are cited by the Court to sustain its conclusion.

The burden is always on the party who alleges that a statute was not passed according to the constitutional requirements and he must furnish the competent evidence necessary to overcome the presumption arising from the ratification of the act. This proof must appear in the record. *Railroad v. Wren,* 43 Ill., 77; *Larrison v. Railroad,* 77 Ill., 11. We do not think that such proof as is sufficient to impeach section 91 of the act has been introduced in this case, if we exclude the entries on the original bill as incompetent, which we must do, as the provision of the Constitution is designed "not only to compel each member present to assume as well as to feel his due share of responsibility in legislation," but also to furnish "definite and conclusive evidence whether the bill has been passed by the requisite majority or not." Cooley on Stat. Lim., *supra.* Having concluded that the Revenue Act, including section 91, is a valid

enactment, we must next inquire whether that section applies only to corporations organized under the laws of this State. It is provided in the section that "On each and every corporation organized under the laws of this State or doing business in this State, an annual franchise tax shall be assessed." The contention of the defendant's counsel is that the word "or" should be construed to mean "and," as it is further provided in the section that any corporation failing to pay the tax shall forfeit its charter, which provision could not apply to the defendant, as it is a non-resident, and that the tax shall be payable in the county "where it has its principal office, the defendant having its principal office outside the State, though its principal office in this State, where it has four offices, is in Wilmington. The object in the interpretation of all statutes is to ascertain the meaning and the intent of the Legislature, to the end that the intent may be enforced, and the construction must be according to the language employed if it is not ambiguous, as it must be presumed that such language has been used by the Legislature as fit and suitable to express its will correctly. Black Int. of Laws, 35. We cannot change words or insert one word for another unless it is necessary to do so in order to make that clear or intelligible which otherwise will be ambiguous or meaningless. We find no such necessity in this case. The Legislature, in our opinion, has said precisely what it meant and has expressed that meaning with sufficient clearness by its language to enable us to see and understand it without interfering with the phraseology or the form of expression which it chose to use in declaring its purpose. No good reason can be assigned why the Legislature should tax domestic corporations and not tax those of other States who seek to do business in this State and who thus come in competition with our home institutions. Such a course would seem to be clear discrimination against the latter and,

if lawful, would not be fair and just, and we would not impute such a motive to the Legislature without the use by it of language which would leave no other construction possible. We do not think the considerations urged as reasons why we should adopt plaintiff's interpretation of the section are sufficient to induce us to change the words of the statute so as to give it a meaning of which it is not now susceptible.

The third ground of objection to the tax is equally untenable. It is true that section 91 provides for an annual franchise tax, but this section is in Schedule C, and section 87 of the act, which is the first section of Schedule C, provides that taxes imposed by that schedule "shall be for the privilege of carrying on the business or doing the act named and shall be subject to the other regulations mentioned in section 35 under Schedule B." Turning to section 35, we find it to be expressly provided that a tax may be imposed by the county, in addition to the State tax, upon the subjects of taxation mentioned in that section. It is provided by section 102 of the act (Schedule C), that when a specific license tax is levied for the privilege of carrying on any business, the county may levy the same tax, unless a provision to the contrary is made in the section levying the specific license tax. Schedule C provides for what is called license taxes to be paid by a designated class of corporations, such as railroads, banks, building and loan associations, insurance, telegraph, telephone and express companies, the amount of the tax being fixed at a certain per cent. on gross receipts or earnings, and on other corporations a tax is levied for carrying on their business, the assessment of which is graduated according to the capital stock paid in or subscribed and this is called a franchise tax, but it is nevertheless, by the very terms of section 87, a privilege or license tax. It is to be observed, in this connection, that sections

89 and 90, which provide for the tax on the first class of corporations we have mentioned, contain a clause exempting those corporations from a county tax, and the taxes imposed by those sections are paid directly to the State Treasurer. But section 91 contains no such clause of exemption so as to bring it within the operation of the proviso to section 102, and the tax by section 91 is required to be paid in the county where the corporation has its principal office, which would indicate that county as well as a State tax was contemplated. Upon a review of the several sections of the Revenue Act relating to this matter we are constrained to think that the defendant is liable for the taxes sought to be recovered in this action. But it is only liable under the act to the State and to the county where it has its principal office, if the latter has seen fit to impose the tax.

It must be certified that there is no error in the judgment of the Superior Court.

No Error.

DOUGLAS, J., concurs only in result.

RAILROAD CO. v. HARDWARE CO.

(Filed April 19, 1904).

1. ACTIONS—*Misjoinder—Attachment—Bonds—The Code, sec. 267.*

It is a misjoinder of causes of action to unite in one suit a cause of action for wrongful attachment and one against the surety for a breach of the attachment bond.

2. PARTIES—*Misjoinder—Attachment—Bonds.*

It is a misjoinder of parties to bring a suit for damages against a person suing out an attachment and the surety on the attachment bond.

3. JURISDICTION—*Superior Courts—Attachment.*

An action against a surety on an attachment bond in the penal sum of $200, being *ex contractu,* must be brought before a justice of the peace.

4. ACTIONS—*Misjoinder—Dismissal—Parties—The Code, sec. 272.*

Where two causes of action are improperly joined, but one of them because of the amount involved is not within the jurisdiction of the court, it is dismissable as to the one over which the court has no jurisdiction.

ACTION by the Pittsburg, Johnstown, Ebenburg and Eastern Railroad Company against the Wakefield Hardware Company, heard by *Judge O. H. Allen,* at September Term, 1903, of the Superior Court of GUILFORD County. From a judgment for the plaintiff the defendant appealed.

No counsel for the plaintiff.

Scales, Taylor & Scales and *R. D. Douglas,* for the defendant.

WALKER, J. This action was brought to recover damages for wrongfully suing out an attachment and was tried below

on a demurrer to the complaint. The plaintiff alleges substantially that the plaintiff, the defendant Hardware Company and the North Carolina Coal and Coke Company are corporations, and that the Coal and Coke Company being indebted to the Hardware Company for goods sold and delivered, the latter brought an action for the recovery of the debt against the railroad company and the Coal and Coke Company, and caused a warrant of attachment to be issued which, in February, 1901, was levied on ten cars, then at the mine of the Coal and Coke Company, and that said cars were seized and held until April, 1903. That at the time the warrant was issued the Hardware Company gave a bond in the sum of $200 with the usual condition, upon which the defendant A. W. Vickory is surety, and that said attachment suit was dismissed as to the plaintiff with costs, and judgment rendered against the Coal and Coke Company for the amount of the debt, in favor of the Hardware Company. Plaintiff then brought this action against the latter company and the surety on its attachment bond, A. W. Vickory, alleging that the attachment was wrongfully sued out, and praying for the recovery of compensatory and punitive damages. The defendant demurred to the complaint upon the following grounds: (1) That there is a misjoinder of parties, the defendant Vickory not being a necessary or proper party to the cause of action at common law, for wrongfully and maliciously suing out the attachment, but being liable, if at all, only on the bond. (2) That two causes of action are improperly joined, one for wrongfully and maliciously causing the attachment to be issued and the other for a breach of the condition of the attachment bond. The Court overruled the demurrer, and the defendants excepted and appealed.

The demurrer should have been sustained on both grounds. The plaintiff has alleged in his complaint two causes of

action, though he has not stated them separately, as he should have done. The Code, section 267 (7). Causes of action may be united in a complaint, when they arise out of the same transaction or transactions connected with the same subject of action, whether they be in contract or in tort (The Code, section 267 (7)); *Cooke v. Smith,* 119 N. C., 350; but each of them must affect *all* the parties to the transaction (section 267 (7)). "It is not sufficient that some of the defendants be affected by each of them. All of the defendants must be affected by each of them to warrant the union of them in one suit." *Howse v. Moody,* 14 Fla., 65. In this case the plaintiff has sued the Hardware Company for wrongfully and maliciously causing to be issued the attachment for which the said company alone is liable in damages, and has joined as a defendant A. W. Vickory, the surety on the attachment bond, who is liable solely by reason of his suretyship on his contract of indemnity and to the amount only of the penalty of the bond, two hundred dollars. One cause of action therefore is for the wrongful and malicious injury to the plaintiff, using the word "injury" in its technical sense, and the other is for the breach of the condition of the attachment bond, and the defendant Vickory can in no way be "affected" by the former. He is not liable generally to the plaintiff for damages simply because he signed the bond as surety, but his liability arises entirely out of contract, and is quite different in its nature from that of his co-defendant for the tort it is alleged to have committed in maliciously suing out the attachment. *Fell v. Porter,* 69 N. C., at page 142. The defendant Vickory is liable by reason of his undertaking, according to the statute, to the effect that if the defendant recover judgment or the attachment is set aside by order of the Court the plaintiff in the attachment suit "will pay all costs awarded against it and all damages sustained by reason of the attachment." As said by *Pear-*

son, C. J., for the Court, in *Fell v. Porter, supra,* a sheriff may be liable on an implied contract upon a principle of the common law, while as to his surety there is no such implied undertaking and no other liability, save that which is set out in his bond, it being an obligation to pay to a certain amount subject to conditions.

The liability of the surety is said to be *strictissimi juris,* which means no more than that he shall not be held to answer beyond the precise terms of his contract, and only to the extent that the particular liability which is alleged to exist is covered by his written obligation. Pingrey on S. & G., section 112. When he is called upon to answer for any liability based on his suretyship he has a right always to ask: "Is it so nominated in the bond?" or other instrument which is the evidence of his undertaking.

Whether if Vickory had been liable jointly with his co-defendant for the tort alleged to have been committed in wrongfully and maliciously suing out the attachment, he could properly have been joined with the latter in an action upon that liability and also upon the bond, is a question we need not decide, as it is not presented upon this record. *Fell v. Porter, supra.* In the case of *Cook v. Smith,* 119 N. C., at page 356, this Court, speaking by the present *Chief Justice,* said: "Always, when the sheriff is sued for official liability, he is responsible personally, and his surety should be sued on the relation of the State, but it has never been held a defect to join them." This was said with reference to the separate liability of the sheriff for an official act which at the same time constituted a breach of his bond, so that while the sheriff in such a case is personally liable, as if he had not signed the bond, his surety is liable for the act of the sheriff because it is also a breach of his bond. The two liabilities are, in legal effect, the same. They are identical and co-extensive in principle, though not in amount.

But when the officer or principal, in addition to the liability on his bond, is independently liable by reason of some act for which the surety is not liable, or which, in other words, does not come within the scope of the latter's undertaking, it is manifest that the surety is not affected by the cause of action upon the separate liability of the officer or principal, and the two causes of action, the one against the officer on his separate liability and the other against the surety on the bond, cannot be joined. *Hoye v. Raymond,* 25 Kan., 665; *Howse v. Moody, supra.* There must be at least substantial identity between the causes of action before they can be united in one suit, because, if there is not, the several causes of action may, for their decision, depend upon very different facts and principles of law, which would tend to confusion and uncertainty in the trial of the case and result in great prejudice to some, if not all, of the parties.

As the two causes of action cannot be united in one and the same complaint, there is another fatal defect to be found in the plaintiff's present suit, so far as the defendant Vickory is concerned. The liability on the attachment bond is one growing out of contract, and any action thereon against the surety is of course *ex contractu.* 1 Shinn on Attachment, section 182, p. 307; Kneeland on Attachment, section 458. As the penalty is only two hundred dollars, the Superior Court has no jurisdiction of an action upon the bond. *Katzenstein v. Railroad,* 84 N. C., 688; *Maggett v. Roberts,* 108 N. C., 174; *Joyner v. Roberts,* 112 N. C., 111.

While the two causes of action stated in the complaint could not be joined for the reasons we have given, the misjoinder does not require the action to be dismissed, as, under the provisions of section 272 of The Code, the Court, in the case of a misjoinder of causes of action, "shall order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action

therein mentioned." This cannot be done in the present case, for the Court would not have jurisdiction of the separate cause of action against Vickory on the attachment bond, the amount of the penalty being only two hundred dollars, but the provision of the statute will be followed to the extent that it can be by dismissing the action as to Vickory.

The case of *McCall v. Zachary,* 131 N. C., 466, is not at all at variance with anything said in this opinion, but is, we think, in perfect harmony with the principle we have stated. In that case the plaintiff sued the defendant to recover the fees of the office of Solicitor which had been collected by him during his incumbency of that office, the plaintiff having previously been adjudged to be entitled to it. The plaintiff alleged that the defendant had received five hundred dollars as fees and he declared against defendant for the recovery of that amount and also against his sureties for the recovery of two hundred dollars, the penalty of the bond given by them for the defendant in the *quo warranto* action to secure the payment to the plaintiff of the fees to that amount in the event of the latter's success in that action. It will be observed that the non-payment of the fees by Zachary to the plaintiff was the gravamen of the action, the cause of action, and in itself was a breach of the bond. It was not a separate and distinct cause, but the same cause as the one upon the bond, the only difference being that the defendant Zachary was liable for a greater amount than his sureties. In the opinion of the Court, delivered by *Furches, C. J.,* it is said that the bond for two hundred dollars is not *the* cause of action, but the failure to pay the five hundred dollars collected by the defendant, and the bond is only a security for the plaintiff of that amount *pro tanto,* or to the extent of its penalty. There was but one cause of action, which was on contract. The recovery against Zachary and his sureties was upon a single default,

and was founded upon one and the same principle throughout. In our case, on the contrary, there is a cause of action for the malicious injury, which is different in its nature and scope from that on the bond. An act of the principal which would merely constitute a breach of the bond, would not be sufficient to warrant a recovery upon the other cause of action. Drake in his work on Attachments says: "It has been uniformly held in this country that an attachment plaintiff may be subjected to damages for attaching the defendant's property maliciously and without probable cause. The defendant's remedy in this respect is not at all interfered with by the plaintiff having at the institution of the suit given bond with security to pay all damages the defendant may sustain by reason of the attachment having been wrongfully sued out." The line of distinction between the two causes of action is clearly "run and marked" in the following cases: *Burnap v. Wright,* 14 Ill., 301; *Lawrence v. Hagerman,* 56 Ill., 68, 8 Am. Rep., 674. See also Cooley on Torts (2 Ed.), p. 218. In the first case cited it is said: "The direct pecuniary injury to the defendant may be as great in the one case as in the other. This direct pecuniary loss is all that can be recovered in an action on the bond. If the writ is sued out maliciously, and without probable cause, the defendant may maintain an action for malicious prosecution. And in such an action he may recover damages for every injury to his credit, business, or feelings. Such matters are peculiarly the proper subjects of inquiry; and the jury may give damages commensurate with the injuries sustained. But such injuries as may be redressed only where malice exists and probable cause is wanting ought not to be taken into consideration in an action on the bond." The action for the malicious wrong is one which exists independently of any statutory provision as to a bond. In *Coal Co. v. Upson,* 40 Ohio St., 25, the doctrine is thus tersely

stated: "It may now be considered the approved doctrine that an action for the malicious prosecution of a civil suit may be maintained whenever, by virtue of any order or writ issued in the malicious suit, the defendant in that suit has been deprived of his personal liberty or of the possession, use, or enjoyment of property of value. The name or form of the writ or process is immaterial. It may be an order of arrest, or of attachment, or of injunction." See also, *Tomlinson v. Warner,* 9 Ohio, 104; *Fortman v. Rottier,* 8 Ohio St. (N. S.), 548, 70 Am. Dec., 606. A strong authority in support of the distinction we have made is *Pettit v. Mercer*, 8 B. Mon., 51.

It follows from what we have said that the demurrer should have been sustained as to the cause of action against Vickory on the attachment bond. This ruling eliminates that cause of action and the suit may proceed against the Hardware Company if the plaintiff desires to further prosecute the same. *Ashe v. Gray,* 90 N. C., 137; *Mfg. Co. v. Barrett,* 95 N. C., 36; *Finch v. Baskerville,* 85 N. C., 205.

The case is remanded for further proceedings not inconsistent with the opinion of this Court.

Error.

CORPORATION COMMISSION v. RAILROAD CO.

(Filed April 19, 1904).

REMOVAL OF CAUSES—*Courts.*

The petition in this case for removal to the federal court on account of diversity of citizenship and the jurisdictional amount does not sufficiently allege the amount involved.

ACTION by the State on the relation of the North Carolina Corporation Commission against the Southern Railway Company, heard by *Judge C. M. Cooke,* at February Term, 1904, of the Superior Court of GUILFORD County. From a judgment for the plaintiff the defendant appealed.

Robert D. Gilmer, Attorney-General, and *Scales, Taylor & Scales,* for the plaintiff.

King & Kimball, F. H. Busbee, R. C. Strong and *C. B. Northrup,* for the defendant.

MONTGOMERY, J. This case is before us upon the appeal of the defendant from an order made at the February Term, 1904, of the Superior Court of Guilford County, and in which his Honor overruled a motion of the defendant for the removal of the action to the United States Circuit Court for the Western District of North Carolina. The matter involved in the proceeding was commenced before the North Carolina Corporation Commission upon complaint of the Greensboro Ice and Coal Company, and was instituted for the purpose of compelling the defendant to deliver to the plaintiff on its side track, at Greensboro, four cars of coal which had been consigned to the complainant and brought by the defendant on its line of railway from the State of Virginia. It appears from the record in the case and from

the evidence, as well, that the side track was built by the complainant, at its own expense, with the exception of the iron rails, which the defendant furnished, and that it extended from the defendant's main line about three hundred yards out to the complainant's coal and wood yard. It appeared, further, that while the side track was in process of construction a number of car-loads of coal arrived in Greensboro consigned to the complainants, and that a contention afterwards arose between the parties on account of a charge against the complainants by the defendant in the nature of demurrage—the amount being $146. Upon the refusal of the complainant to pay the amount, or any part of it, the defendant notified, by letter, the complainant that it would on that account not thereafter switch any cars to the side track, but would place them on the public team tracks of the defendant in its yard at Greensboro. There was a further statement in the letter to the effect that defendant found it necessary for the protection of its equipment to tender to the complainants further deliveries of cars upon tracks where they might be under defendant's immediate supervision and control. After a hearing of the matter before the Corporation Commission an order was made by that body as follows:

"This cause coming on to be heard upon complaint and after notice to the defendant and an appearance by them, and it being made to appear to the Commission by the plaintiff that four cars of coal, consigned to the complainant, have been conveyed to Greensboro by the Southern Railway Company, and that said cars are now and have been on the yards of said railway company for several days, and that the agents of said company were requested by said consignees to place said cars for unloading soon after their arrival on a side track built at the expense of and by said complainant and said railway company to facilitate the loading and

unloading of complainant's freights. And that said consignees offered to pay the freight charges due on said cars of coal if the railway company would indicate their willingness to place them as requested by consignees; and it further appearing that the said railway company have refused to place the said cars as requested and insist that they will place said cars only on public team tracks; and it further appearing that said cars of coal can be unloaded by consignees in much less time and at much less expense on the track constructed for that purpose than on public team tracks and at no greater expense to the railway company; and it further appearing that the cause assigned by the Southern Railway for its refusal to place cars as requested by consignees is insufficient, namely: That consignees refused to pay certain demurrage charges which the railway company claims accrued on other cars while on public team tracks of said railway company, and which charges the consignees dispute and allege to be unjust:

"It is, therefore, ordered that the Southern Railway Company, upon the payment of the freight due on said cars of coal, and within forty-eight hours after service of this order, place the four cars of coal consigned to the Greensboro Ice and Coal Company on tracks provided by complainant and defendant for the loading and unloading of the freights of the complainant, to the end that the same may be unloaded and the complainant receive their freights.

"FRANKLIN MCNEILL,
"Chairman N. C. Corporation Commission."

Exceptions were filed to that order by the defendant, and on November 12, 1903, they were heard by the Corporation Commission at Greensboro. They were as follows:

"To the Honorable the North Carolina Corporation Commission, Raleigh, North Carolina:

"The Southeren Railway Company, a corporation existing under and by virtue of the laws of the State of Virginia, filed with your honorable board its exceptions to the particulars that it objects to your order, or judgment, of date October 31, 1903, relative to the placing of the four cars of coal involved upon the private track of the Greensboro Ice and Coal Company, in Greensboro, North Carolina, and states the grounds thereof, as follows:

"*Exception No. 1.*—That the side track of the Greensboro Ice and Coal Company is the private property of that company, with the exception of the rails, and is under the control of that company and built by that company for its own use and convenience, and not for the use or convenience of the Southern Railway Company; that to make the said side track more useful and profitable to said Coal and Ice Company, that company caused the track to be gradually raised so that cars of coal could be dumped into bins made under said track with the least inconvenience to the said Coal and Ice Company; that during the construction of this work, and with no default on the part of the Southern Railway Company, certain demurrage charges accrued, under order No. 36, Rules of your honorable board, on five car-loads of coal and on eight car-loads of wood, amounting in all to one hundred and forty-six dollars ($146.00), and under promise to pay said amount, upon which the Southern Railway Company relied and acted, the said Coal and Ice Company induced the Southern Railway Company to place the said car-loads of coal and wood upon the said private side track, and said Coal and Ice Company have since refused to pay said demurrage charges, though several times requested and demanded by the Southern Railway Company to do so; that the Southern Railway Company thereupon refused and still

refuses to place any more cars of freight upon the private side track of the Coal and Ice Company, and to extend them credit or part with their legal lien upon the four car-loads of coal ordered placed by your honorable board, or with their legal lien upon any goods, wares or merchandise, until all freight, demurrage, or other charges have been fully paid, which the said railway company submits it has the right to do.

"*Exception 2.*—That the Southern Railway Company is ready and willing, and has repeatedly offered to place said four cars of coal and other cars of merchandise accessible on its public team or delivery track in the city of Greensboro, N. C., and has placed said cars accessible as aforesaid, but the said Coal and Ice Company refuses to so receive them. Southern Railway Company contends and insists that the said Coal and Ice Company has not any superior right to the delivery of their goods, wares and merchandise, and that it is justified in refusing to place cars of the Coal and Ice Company upon its private siding or tracks, and thus part with their property.

"*Exception 3.*—That the said order or judgment herein excepted to is contrary to the Fourteenth Amendment to the Constitution of the United States, in that it deprives the Southern Railway Company of its property without due process of law, and denies to it the equal protection of the law for that,

"*a.* It requires the railway company to part with the lien given it by law upon all goods, wares and merchandise until the freight and demurrage and all other lawful charges are paid.

"*b.* It requires the Southern Railway Company to give or extend credit to the said Coal and Ice Company which it is unwilling to do.

"*c.* It is an adjudication of your honorable board without

complaint and answer required by your own rules of practice and without legal or any sufficient evidence before you necessary for the said judgment to be entered, and upon which these exceptions are based.

"*Exception 4.*—That the said order or judgment herein excepted to is contrary and is repugnant to the Constitution of the United States as an attempted regulation of interstate commerce, and to a certain of act of Congress known as the Interstate Commerce Act, in that the four car-loads of coal, the subject of said order or judgment, were shipped to said Coal and Ice Company at Greensboro, from points in the State of Tennessee and the State of Virginia, and is an interference by your honorable board with interstate shipments.

"Whereupon the Southern Railway Company prays that said order herein excepted to be reviewed and vacated.

"This November 2, 1903."

From the overruling of the exceptions, the defendant appealed to the Superior Court of Guilford County. On the first day of the term of that Court to which the appeal was taken the defendant lodged its motion for the removal of the cause to the Circuit Court. The petition duly verified and signed, was as follows:

"*To the Honorable the Superior Court of the County of Guilford, State of North Carolina:*

"Your petitioner, Southern Railway Company, respectfully showeth that it is the defendant in the above-entitled suit or proceeding, which was begun against it before the North Carolina Corporation Commission, and was transferred by appeal to the Superior Court of Guilford County, North Carolina, and that an informal paper in the nature of a complaint has been filed in the said action, and that

the defendant, your petitioner, files this petition at or before the time when it is obliged to answer or demur to the complaint in the said Superior Court, and at its first opportunity to make such motion.

"That the matter in controversy therein exceeds, exclusive of interest and costs, the sum or value of two thousand dollars ($2,000).

"That the said suit or proceeding is of a civil nature, and is a proceeding to assert and enforce the right of the Greensboro Ice and Coal Company to have the North Carolina Corporation Commission order and direct your petitioner to deliver certain interstate shipments to the plaintiff, Greensboro Ice and Coal Company, and the matter actually in controversy involving the right of the defendant to manage its large interstate commerce without any interference on the part of the plaintiffs, largely exceeds the sum or value of two thousand dollars ($2,000).

"Your petitioner further states that in the said above-mentioned suit or proceeding there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to-wit, a controversy between your petitioner, which was at the commencement of this action, and still is, a citizen and resident of the State of Virginia, and is not and was not at the time this action began, a citizen and resident of North Carolina, and that the defendant is a corporation originally created by and under the laws of the State of Virginia, and was at the commencement of this suit, and still is, such; and the said North Carolina Corporation Commissioners and the Greensboro Ice and Coal Company, whom your petitioner avers were, at the commencement of this suit or proceeding, and still are, citizens of the State of North Carolina, some of whom, to-wit, Franklin McNeill and Eugene C. Beddingfield, are residents of the Eastern District thereof, and Greensboro Ice and Coal

Company and Samuel L. Rogers are citizens and residents of the Western District, and that the plaintiff, Greensboro Ice and Coal Company, is a corporation originally created by and under the laws of the State of North Carolina, and was at the commencement of this suit, and still is, such; and that all of the said defendants and your petitioner are actually interested in the said controversy.

"And your petitioner offers herewith a bond with good and sufficient surety in the sum of five hundred ($500) dollars for its entering in the Circuit Court of the United States for the Western District of North Carolina, on the first day of its next session, a copy of the record in this action, and for paying all costs which may be awarded by the said Circuit Court if said Court shall hold that this action was wrongfully or improperly removed thereto, and for entering a special bail if such be required.

"And your petitioner prays this Court to proceed no further herein, except to make an order of removal and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the Western District of North Carolina."

It appears to us from the record in the cause, including the petition, that his Honor was right in refusing a motion to remove the cause, although he gave a wrong reason for the judgment, as we shall hereafter point out. We are aware that there are decisions of the Supreme Court of the United States in which it is held that issues of fact cannot be made in the State Courts upon the petition for removal, and that such issues must be tried in the Circuit Court; and we are not in the least disposed to question the correctness of those decisions. We know, however, that in those same decisions it was held that the State Court could determine for itself, on the face of the record, whether a removal had been

effected. In *Stone v. South Carolina*, 117 U. S., 430, the Court said: "A State Court is not bound to surrender its jurisdiction on a petition for removal until a case has been made, which on its face shows that the petitioner has a right to the transfer. *Tullee v. Vose*, 99 U. S., 539, 545; Removal Cases, 100 U. S., 457." It is undoubtedly true, as was said in *Steamship Co. v. Tugman*, 106 U. S., 110, that upon the filing of the petition and bond, the suit being removable under the statute—the jurisdiction of the State Court absolutely ceases and that of the Circuit Court of the United States immediately attaches, but still, as the right of removal is statutory, before a party can avail himself of it he must show upon the record that his is a case which comes within the provision of the statute. As was said in *Insurance Co. v. Pechner*, 95 U. S., 183, "his petition for removal when filed becomes a part of the record in the cause. It should state facts which, when taken in connection with such as already appear, entitle him to the transfer. If he fails in this he has not, in law, shown to the Court that it cannot 'proceed further with the suit.' Having once acquired jurisdiction the Court may proceed until it has been judicially informed that its power over the case has been suspended. The mere filing of a petition for the removal of a suit which is not removable does not work a transfer. To accomplish this the suit must be one that may be removed and the petition must show a right in the petitioner to demand a removal." The record in this case, if we leave out for the present the petition, shows that the object of the proceeding, technically and literally, was to compel the defendant to place upon the side track, leading to the complainant's coal yards, the four car-loads of coal which the defendant was refusing to deliver under an alleged contract with the complainant at the time the complaint was made before the Corporation Commission. But suppose we give a broader significance to the complaint

and order made therein, as to the effect of the order upon the defendant in thereafter being compelled by repeated orders to deliver each and all car-loads of coal that the defendant company might bring upon their line of railway into Greensboro, consigned to the complainant, is not the petition of the defendant for removal fatally defective in that it does not put a valuation upon the advantage which the plaintiff might derive from such a construction of his complaint and the order of the Corporation Commissioners? Suppose it be admitted that this proceeding when begun before the Corporation Commissioners was in the nature of a suit in equity and that the amount in controversy should be measured by the value of the object to be gained by the plaintiff, is there anything in the petition going to show that such advantage or benefit to the plaintiff was worth $2,000? In such equity cases as we have referred to "it is the value of the whole object of the suit to the complainant which determines the amount in controversy," as was said in *Railway Company v. McConnell,* 82 U. S., 65. The plaintiff in his complaint put no valuation upon what might be the effect of the delivery to it on its side track either of the four particular cars, or of the delivery of all cars that might in the future be consigned to him over the defendant's railroad; and the defendant in its petition makes no statement as to the "amount in controversy" in either aspect of the plaintiff's benefit and advantage.

It appears from a careful reading of the petition that the statement as to the amount in controversy was based not upon the amount that the object of the action might be to the plaintiff, but to the inconvenience and loss of the defendant because of the interference of the Corporation Commission with the right of the defendant to manage its large interstate commerce. The exact language of the petition on this point is as follows: "That the said suit or proceeding

is of a civil nature, and is a proceeding to assert and enforce the right of the Greensboro Ice and Coal Company to have the North Carolina Corporation Commission order and direct your petitioner to deliver certain interstate shipments to the plaintiff, Greensboro Ice and Coal Company, and the matter actually in controversy involving the right of the defendant to manage its large interstate commerce without any interference on the part of the plaintiffs, largely exceeds the sum or value of $2,000." That statement as to the matter in controversy is simply a conclusion of law, and an erroneous one in our opinion, from the facts as they appear in the record and even in the petition. The matter in controversy was not an attempt on the part of the complainant to interfere with the general business of the defendant, the "large interstate commerce" of the defendant, but was only an order affecting the delivery of certain car-loads of coal consigned to the complainant, and, as we have said, there was no valuation by the defendant of that benefit secured to the plaintiff by the order.

Affirmed.

BEAN v. BEAN.

(Filed April 19, 1904).

1. EXECUTORS AND ADMINISTRATORS—*Estoppel—Accounts—The Code, secs. 1399, 1400, 1402.*

An account filed by an executor is only *prima facie* correct, and he is not estopped to impeach it.

2. EXECUTORS AND ADMINISTRATORS—*Husband and Wife—Legacies and Devises—Descent and Distribution.*

An executor whose wife is the residuary legatee under the will of the testator is not entitled to credits for sums paid for taxes on his wife's land or for money paid to defray his wife's expenses on a trip.

ACTION by Mary A. Bean against M. L. Bean, heard by *Judge W. R. Allen* and a jury, at November Term, 1903, of the Superior Court of ROWAN County. From a judgment for the plaintiff the defendant appealed.

A. H. Price, Walter Murphy and *T. F. Kluttz,* for the plaintiff.

John S. Henderson, for the defendant.

WALKER, J. The plaintiff, who is the wife of the defendant, is the residuary legatee under the will of Nancy Smith, and the defendant is the executor of the latter and qualified as such in March, 1889. On December 22, 1896, the plaintiff caused a citation to be issued by the Clerk of the Superior Court to the defendant to appear at a time stated in the notice and file an account under sections 1399 and 1400 of The Code. The defendant appeared and filed the account, and insisted before the Clerk that he was entitled to two credits, one for taxes paid by him "for the benefit of the plaintiff" on her land for the years 1892 to 1896, both

inclusive, amounting to $775, and the other for money paid by him to R. J. Holmes to defray the plaintiff's expenses to Baltimore. The Clerk disallowed these claims and upon auditing the account found that defendant owed the estate a clear balance of $466.45. The plaintiff thereupon brought this action in the Superior Court to recover said balance. There is some reference in the case to other legacies which had not been paid, and it does not appear, except by inference, whether the $466.45 is due to the estate merely for distribution among the several legatees, or is due to plaintiff after paying all claims and legacies and the costs and expenses of administration. The plaintiff though sues for this balance and the defendant in his answer admits that it is due to the plaintiff unless he is entitled to the said credits. The Court ruled that the defendant could not successfully assert his claim "because he was estopped to deny the adjudication of the Clerk." The ruling of the Court was correct, that is, its conclusion, but the reason given therefor was not. The defendant was not estopped by the proceeding before the Clerk. The account as filed and stated in response to the citation had no more force or effect against him than the account would have had if he had filed it voluntarily. The statute expressly provides that "it shall be deemed *prima facie* evidence of correctness," even when it is audited by the Clerk by the examination of vouchers or witnesses or of both. The auditing is an *ex-parte* proceeding and has none of the features or characteristics of that kind of judicial proceeding the judgment in which works an estoppel upon the parties. This would seem to be so whether the account was filed under section 1399 or section 1402, as the language of the two sections in regard to the manner of compelling the filing of the account, whether annual or final, and of auditing the same, is substantially alike although the words "shall be deemed *prima facie* evidence of correct-

ness" are omitted in section 1402. *Grant v. Hughes,* 94 N. C., 231. In *Allen v. Royster,* 107 N. C., at p. 282, this Court said: "But it (the account) was not conclusive against the plaintiff (next of kin), nor would it be against the creditors or any person interested adversely. It simply shifted the burden of proof as to the correctness of what it contained to him who alleged the contrary." *Rowland v. Thompson,* 64 N. C., 714. In *Collins v. Smith,* 109 N. C., at p. 471, the same principle is stated: "The record shows, and the fact is found, that at the instance of the plaintiffs the final account of the defendant was audited and filed, the plaintiffs being present and contesting various items therein. There is no allegation of any fraud or mistake in the final account so audited, nor is it attacked in any way by the plaintiff, and it is at least *prima facie* correct."

While it is to be considered as *prima facie* correct it has no more conclusive effect than an account stated and is open to attack. The defendant could at least surcharge and falsify it if he was able to do so.

But we do not think that the defendant was entitled to either of the two credits claimed by him. As executor he was not charged with the duty of paying the taxes on his wife's land, and this and the other item could in no way enter into or form a part of his transactions as the representative of his testator. *Young v. Kennedy,* 95 N. C., 265. If he was not himself under any legal obligation to make the advancements of money for his wife the law will not, under the facts and circumstances of this case, imply any promise of his wife to repay him. *Jenne v. Marble,* 37 Mich., 322; *Pittman v. Pittman,* 4 Ore., 298. We conclude therefore that in no view of the case was he entitled to the credits. This of course sustains the decision of the Court below.

No Error.

CHAFFIN v. MANUFACTURING CO.

(Filed April 19, 1904).

1. INSTRUCTIONS—*Trial.*

The trial judge need not give instructions in the very language employed in framing them if they are substantially given in the charge.

2. INSTRUCTIONS—*Trial—Issues—Exceptions and Objections.*

The language of an instruction exactly corresponding with the words of an issue submitted, to which no exception was taken, is not open to the criticism that it is misleading.

3. INSTRUCTIONS—*Trial—Exceptions and Objections.*

Where an instruction is erroneous, and is duly excepted to, the party excepting may avail himself of the error, though he asked no special instruction on the subject.

4. DAMAGES—*Instructions—Waters and Water-courses.*

In an action for damages caused by a dam across a stream, an instruction that the party alleging damages must prove the same to the satisfaction of the jury, where the trial judge charged that the burden was on him and defined a preponderance of evidence, is not objectionable.

5. DAMAGES—*Nominal—Waters and Water-courses.*

An instruction that to entitle a plaintiff to nominal damages he must show damages capable of being estimated, perceptible, as an appreciable quantity, is erroneous.

6. EVIDENCE—*Damages—Waters and Water-courses.*

In an action for damages caused by a dam across a stream, it is not competent to show the effect of the increased benefit of the water on the lands of adjoining owners.

7. EVIDENCE—*Damages—Waters and Water-courses.*

In an action for damages by a dam across a stream, it is competent to show the condition of the banks of the stream above and below the dam in order to show that this condition was not caused by the erection of the dam.

ACTION by Julia Chaffin and others against the Fries Manufacturing and Power Company, heard by *Judge W. R. Allen* and a jury, at October Term, 1903, of the Superior Court of DAVIE County. From a judgment for the defendant the plaintiffs appealed.

E. L. Gaither, E. J. Justice and *Lindsay Patterson,* for the plaintiffs.

Watson, Buxton & Watson, for the defendant.

WALKER, J. The plaintiffs are the owners of a farm on the west bank of the Yadkin river. They bring this action to recover damages, both permanent and annual, for injury to the land alleged to have been caused by the erection and maintenance of a dam by the defendant across the river and below their tract of land. They allege that the dam raised the water in front of their land about six feet, and there was evidence on the part of the defendant that it had been raised two feet and nine inches, but that the banks of the river at that place were fourteen feet high.

The plaintiffs claimed that by this rise in the water along their farm, the fall in a branch running from their land into the river had been destroyed and the water in the branch had been ponded back further on their lands and that by reason of this loss in fall their lands had become incapable of being ditched and had been rendered unproductive. And they further claimed that by raising the water six feet their lands had become more subject to overflow, and that thereby their bottom lands had been washed and rendered worthless. The defendant denied all of said allegations.

There was much testimony introduced by both parties, some tending to show that the plaintiffs had been injured and damaged by the erection and maintenance of the dam and some tending to show that they had not, but that the damage to their land was due to other causes than the erection of the dam.

The Court submitted to the jury the following issue, "What damage, if any, has plaintiffs sustained by reason of the erection of the dam?" The jury answered this issue "None." There was a judgment upon this verdict against the plaintiffs and they excepted and appealed.

The plaintiffs' first exception is to the refusal of the Court to give their first prayer for instructions. In this prayer they requested the Court to instruct the jury as to the estoppel against the plaintiffs arising out of the verdict and judgment in this case, because the damages would be assessed by the jury for all time, they being past, present and prospective. If the plaintiffs were entitled to have this instruction given in the form in which it was asked, we are of the opinion that the nature of the suit and of the damages that could be awarded were fully explained to the jury by the Court, and that plaintiffs were not prejudiced by the refusal to give the specific instruction. The same may be said of the second and third prayers for instructions, which related to the kind of damages to which plaintiffs would be entitled should the jury find in their favor. The plaintiffs cannot insist that the Court should have given these instructions in the very language employed in framing them. It is a sufficient response to prayers if the Court, in its own words, chosen perhaps so as not to do any injustice to either side, gives the instructions substantially, provided that the party who asks for them will have the full benefit of the principles of law he seeks to have applied to the facts. This rule is

too familiar to need further comment or the citation of authority to support it.

The plaintiffs also complain that the Court in charging the jury as to the damages referred only to those which were caused by the "erection" of the dam, and that by failing to use the words "and maintenance" the jury were misled as to the kind of damages the plaintiffs were entitled to recover, and the Court thereby excluded from their consideration any damages which may have resulted from the maintenance of the same. It will be observed that if this criticism of the charge were correct in itself, the language of the Court corresponds exactly with that of the issue, and to this issue when submitted by the Court there was no exception. But we do not think the plaintiffs have any ground of complaint because of any such defect in the charge, as, upon even a cursory examination of it, we think it will appear that the Court made it perfectly clear to the jury that plaintiffs were entitled to recover, if anything, the damage caused both by the erection and maintenance of the dam—not only damages caused at or immediately after the time of its erection, but those which have been caused since that time by the dam as an obstruction in the stream.

We approve the charge of the Court as to the proper rule for assessing the damages. *Ridley v. Railroad,* 118 N. C., 1009, 32 L. R. A., 708; *Parker v. Railroad,* 119 N. C., 677. No question is presented in this case as to the right of acquiring a perpetual easement by the payment of permanent damages. The defendant is not a public or *quasi* public corporation and has not therefore the right to condemn private property for its uses, or, in other words, the right of eminent domain.

The plaintiffs' sixth exception was taken to the following instruction of the Court to the jury: "It is not sufficient for the plaintiffs to show that their land has been damaged

and their rental value decreased. They must further prove to the satisfaction of the jury that this damage was caused by the erection of the dam"; and the seventh exception was taken to this instruction: "If you find from the evidence that the erection of the dam caused water to be ponded on the lands of the plaintiffs to any appreciable extent the plaintiffs would be entitled to recover nominal damages, although you might not be satisfied that the plaintiffs have suffered substantial damages." The plaintiffs contend that by the first of said instructions the Court required a greater degree or intensity of proof to be adduced by the plaintiffs than the rules of evidence warranted, and that all that is required by those rules is that plaintiffs should prove their case by the greater weight of the testimony and not to the satisfaction of the jury. The part of the charge selected for the exception is not all of the charge as to the degree of proof required. The Court had already charged the jury as follows: "The burden is upon the plaintiffs," etc., "to satisfy you that the erection of the dam was the cause of the damage to them and of the extent of the injury. What is a preponderance? It is not to be determined by the number of witnesses. In determining whether there is a preponderance you will consider the demeanor of witnesses, etc." It will not do in passing upon the correctness of a charge to consider it in detached portions, but we must look at the context and examine what follows in connection with that which precedes. In other words, the charge must be considered as a whole. *Elliott v. Jefferson*, 133 N. C., 211; *Everett v. Spencer*, 122 N. C., 1010. The same rule applies when deciding upon the admissibility of testimony. *State v. Ledford*, 133 N. C., 714. When the part of the charge of the Court excepted to is considered and tested by this reasonable rule of the law, we think it sufficiently and indeed clearly appears that the jury were instructed, at least substantially, that the

plaintiffs were required to make out their case by a preponderance of the evidence, and that the Court explained to them with sufficient fulness and accuracy what is meant by the preponderance of the testimony and how the jury should apply the rule to the facts and circumstances of the case in order to determine whether plaintiff had met the requirement. The use of the word "satisfied" did not intensify the proof required to entitle the plaintiffs to their verdict. The *weight* of the evidence must be with the party who has the burden of proof or else he cannot succeed. But surely the jury must be satisfied or, in other words, be able to reach a decision or conclusion from the evidence and in favor of the plaintiff which will be satisfactory to themselves. In order to produce this result or to carry such conviction to the minds of the jury as is satisfactory to them, the plaintiffs' proof need not be more than a bare preponderance, but it must not be less. The charge, as we construe it, required only that plaintiffs should prove their case by the greater weight of the evidence.

In *Neal v. Fesperman,* 46 N. C., 446, the Court (by *Pearson, J.*), in stating the true rule in civil cases, said that "the party affirming a fact must prove it to the satisfaction of the jury, because the "*onus probandi*" is upon him. If he does prove it to the satisfaction of the jury it is settled that, in civil actions, he is entitled to a verdict in his favor upon the issue." After referring to the rule in capital cases, the Court proceeds: "Suffice it, in civil cases, if the jury are *satisfied,* from the evidence, that an allegation is true in fact, it is their duty so to find, and they should be so instructed." To the same effect is *Barfield v. Britt,* 47 N. C., 45, 62 Am. Dec., 190, where the Court says, "That the party upon whom lay the *onus probandi* must produce such a preponderance of testimony as must satisfy the jury of the truth of his allegation." The rule, it is further stated, applies to all civil cases. It is said in *Kincade v. Bradshaw,*

10 N. C., 65, that "in civil cases juries weigh the evidence and *decide* accordingly as either scale preponderates." This means of course that they weigh the evidence and decide, that is satisfy themselves, as to where the preponderance is. An unsatisfactory decision could hardly be called a decision at all, and a jury, acting intelligently and honestly, certainly would not adopt a conclusion from the evidence with which they were not satisfied. Woods Pr. Ev., section 197.

In criminal cases when the defendant relies on mitigating circumstances or sets up an affirmative defense, such as legal provocation, insanity, or self-defense, it is incumbent on him to prove the matter in mitigation or excuse, not beyond a reasonable doubt nor by a preponderance of evidence, but simply to the satisfaction of the jury. *State v. Willis,* 63 N. C., 26; *State v. Carland,* 90 N. C., 668; *State v. Barringer,* 114 N. C., 840; *State v. Barrett,* 132 N. C., 1005. Counsel for the plaintiffs argued that these cases are authority for the position that if the jury must be satisfied it required a greater degree of proof than if the plaintiff is allowed to make out his case by a mere preponderance of the evidence. We do not think this is a correct interpretation of the cases. The rule in criminal cases as above stated is supported by a long line of decisions and is too well settled to admit of any change, but they do not sustain the contention of counsel. In criminal cases the jury decide upon the matters in mitigation or excuse without reference to any rule of law in regard to a reasonable doubt or the preponderance of the evidence. They are the sole judges upon the evidence of what is sufficient to satisfy them. In civil cases they must also be satisfied, but the party having the affirmative of the issue cannot entitle himself to their verdict unless the evidence preponderates in his favor.

The next instruction, which is the subject of the plaintiffs' seventh exception, it seems to us is not as free from objection.

The Court charged the jury that the plaintiffs would be entitled to recover nominal damages if the water had been ponded on their lands "to any appreciable extent." Appreciable is defined as "Capable of being estimated or large enough to be estimated; perceptible, as an appreciable quantity." We do not think that in order to recover nominal damages it is necessary to show an injury that is capable of being estimated, or one that is perceptible in the sense that it is attended with some actual damage. Nominal damages are a small and trivial sum awarded for a technical injury due to a violation of some legal right, and as a consequence of which some damages must be awarded to determine the right. 1 Joyce on Damages, section 8; 1 Southerland on Damages, section 9. These damages are not given as an equivalent for the wrong but in recognition of the technical injury. It is not necessary that there should be any actual damage, however small. They are called nominal damages in contradistinction to actual, substantial or compensatory damages. They are damages in name only, not in fact. See also, Black's Law Dict., page 316, "Damages." They have been described as a "peg on which to hang costs," but they are still recognized as the subject of a substantial legal claim, and a party is entitled to them if he can show *any* injury to his right. If he establishes a cause of action, that is, an injury in its technical sense, and fails to show any *damnum* or damage, he can recover nominal damages. *Osborn v. Leach*, 133 N. C., 427.

We find the law stated in Cooley on Torts (2 Ed.), page 74, as follows: "In the case of a distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary and proximate result. Here the wrong itself fixes the right of action; we need not go further to show a right

of recovery, though the extent of recovery may depend upon the evidence."

In the case of *Litle v. Stanback,* 63 N. C., 285, the rule as to nominal damages in cases of this kind seems to have been settled by this Court. It is there said: "The defendant asked his Honor to charge the jury that if there was water backed by the defendant's dam on the plaintiff's wheel and it produced no injury to the plaintiff the plaintiff was entitled to no damages, and their verdict should be for the defendant. His Honor declined to give the instruction, but charged the jury that 'if they were satisfied that the water was ponded back by the defendant's dam on the plaintiff's wheel, but produced no *substantial* injury, the plaintiff would be entitled to *nominal damages.* Giving to the exception and to his Honor's charge a plain and just interpretation, we think that the point intended to be presented was 'Is the mere fact of ponding back the water upon the plaintiff's premises sufficient to entitle him to nominal damages?' His Honor thought it was and we are of the same opinion. It is like a trespass on land, when the allegation is that the defendant broke the plaintiff's close and trod down his grass. It is clear that the mere entry upon the land, although there be not so much perceptible injury as the treading down a single sprig of grass, is a trespass, and entitles the plaintiff to nominal damages."

It will be observed that the Court, in describing the injury that will entitle the plaintiff to nominal damages, uses negatively the word "perceptible," which, as we have seen, is one of the synonyms of the word "appreciable." The case seems to be directly in point. If there is an infraction of the plaintiffs' legal right to the undisturbed possession of his property the law absolutely gives at least nominal damages. A case which also seems to be directly in point is *Wood v. Ward,* 3

Exc. (Wels. Hurls & E., 746). The doctrine as applicable to cases of this sort is discussed and the authorities collected in Joyce on Damages, section 2140. 1 Southerland on Damages, sections 9 and 10; *Ripka v. Sergeant,* 7 S. & R., 9, 42 Am. Dec., 214. The defendant contends that plaintiffs cannot avail themselves of this error of the Court, as they asked no special instruction as to nominal damages. This was not necessary. The fault was in the charge and was duly excepted to. It was an affirmative error.

The evidence as to the effect of the increased height of the water on the lands of N. A. Peebles we do not think was competent in order to show a corresponding effect upon the plaintiffs' lands. Comparisons such as this one cannot be made, as there was no evidence to show similarity of conditions. The proposed evidence would introduce irrelevant matters and divert the minds of the jury from the true issue. *Bruner v. Threadgill,* 88 N. C., 361; *Warren v. Makely,* 85 N. C., 12. The competency of the testimony of the witness Reynolds depends upon a different principle. The evidence offered as to similar conditions of the banks of the stream above and below the dam with a view of showing that they had been washed out by freshet, and that their condition was not caused by the erection of the dam, was proper to be considered by the jury as a circumstance tending to sustain the defendant's contention. Its weight is for the jury to pass upon.

We have considered all of the plaintiff's exceptions as they, or some of them at least, may be presented at the next trial of the case, and for the further reason that they present important questions of practice and procedure of constant recurrence which should be settled.

Because of the error in the charge as to nominal damages there must be a new trial, and as there was but one issue

submitted to the jury, embracing both the cause of action and the damages, the new trial must extend to the whole case.

New Trial.

DOUGLAS, J., concurs in result.

JUNGE v. MACKNIGHT.

(Filed April 19, 1904).

JUDGMENTS—*By Default Final—Cancellation of Instrument—Cloud on Title—Deeds—The Code, secs. 208, 385, 386, 237, 390.*

The rendition of a judgment by default final at the return term in an action to cancel a deed, is an irregularity for which it should be set aside.

CONNOR and WALKER, JJ., dissenting.

ACTION by W. P. Junge and another against H. P. MacKnight, heard by *Judge C. M. Cooke,* at September Term, 1903, of the Superior Court of MOORE County. From a judgment for the plaintiff the defendant appealed.

U. L. Spence and *W. J. Adams,* for the plaintiff.
H. P. MacKnight, in propria persona.

MONTGOMERY, J. The plaintiff filed his complaint at the May Term, 1903, of the Superior Court of Moore County and alleged therein that he was the owner in fee and in the possession of a certain lot of land described in the complaint, and that the defendant, through an alleged deed of the sheriff of the county made under an execution, had cast a cloud upon the plaintiff's title. The prayer for judgment was that the deed from the sheriff to the defendant be

declared void and cancelled. The defendant having filed no answer a judgment by default final was entered up against him. In that judgment it was decreed that the title to the property was in plaintiff, that the deed from the defendant to the sheriff was of no effect and void and that it be delivered up and cancelled. At the next term of the Superior Court the defendant, after having given the plaintiff proper notice, made a motion in writing to set aside the judgment by default final on the ground that it was irregular, and because the summons was not served on the defendant ten days before the first day of the term of the Court at which the judgment was entered. His Honor refused the motion on the ground that the facts as he found them showed that the summons was served on the defendant ten days before the beginning of the term of the Court. We are of the opinion that the judgment should have been set aside for irregularity. Judgments by default final can be rendered in this State only in the cases mentioned in section 385 of The Code, and this case does not fall under that section. In section 386 of The Code it is provided that in all other actions, except those mentioned in 385, when the defendant shall fail to answer, and upon a like proof, judgment by default and inquiry may be had at the return term, and inquiry shall be had at the next succeeding term.

In the same section (386) it is further provided that, except when a reference may be ordered to state a long account, the inquiry shall be executed by a jury unless by consent the Court is to try the facts as well as the law. The clear meaning of section 386 of The Code is that in all actions except those embraced in section 385 of The Code a plaintiff cannot recover a judgment by default final upon the failure of the defendant to answer until he has proved all the material allegations of his complaint.

In Georgia, there are special exceptions, as with us, in

which judgment by default final may be had, and we find numerous cases in the Court of that State in which it is held that a plaintiff cannot take a judgment by default upon the failure of the defendant to file an answer until he has proved all the material allegations of his complaint, and in *Sannes v. Sayne*, 78 Ga., 468, the Court said: "The defendant while in default may resist passively whatever is brought to attack him, but cannot make a counter-attack. Though not allowed to return the fire he is not obliged to run but may stand until he is shot down. Exceptions to the general rule are made by statute, but this case is within the relief itself." And in regard to the plaintiff, the Court said: "Whether, on matters of fact, he is before the jury or before the Judge can make no difference in his burden. He must produce enough evidence to manifest the truth of every material allegation. There is a trial to that extent, though there be no issue in the record. There must be an examination of evidence and a determination of such facts as the declaration necessarily involves. The law itself, by requiring evidence, puts the truth of these facts in issue, and keeps up the issue until the facts are established." If this action had been for the recovery of or for the possession of the land, the defendant having failed to answer and to file the undertaking required by section 237 of The Code, judgment by default final might have been rendered against him under the provisions of section 390 of The Code. *Jones v. Best*, 121 N. C., 154. The last-mentioned section of the Code furnishes the only additional exception to the rule laid down in section 386.

Reversed.

CLARK, C. J., concurring. The Code, section 385, allows a judgment by default final at the return term "on failure of the defendant to answer," upon a verified complaint

alleging an express or implied contract to pay a "sum of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation." And section 386 provides: "*In all other actions,* except those mentioned in the preceding section, when the defendant shall fail to answer and upon a like proof (as to service of summons, etc.), judgment by default and inquiry shall be had at the return term, and inquiry shall be executed at the next succeeding term." This language is too explicit to admit of two constructions.

When the action is one sounding in damages and there is judgment by default and inquiry, the inquiry must be made at the next term by a jury. In most other cases, especially in proceedings formerly cognizable in equity, the judgment by default and inquiry at the return term upon failure to answer authorizes a judgment final *pro confesso* at the next term by the Court on inspection of the record without further proof, if the complaint is verified. The statute has authorized a final judgment at the return term only in the instances stated in section 385. The general rule (section 208) is that the decision of a cause is to be had not before the second term, and the exception made as to final judgment at the return term when no answer is filed is restricted to the plain cases mentioned in section 385, probably for the reason that it could not be known till the Court was on the point of adjourning that no answer would be filed; and in all cases but a plain action for a definite money demand on a verified complaint the Court would not ordinarily have opportunity to consider the effect of a judgment *pro confesso*, or it may be that it was intended, except as to such plain actions, to give a defendant who had been inadvertent, or badly advised, opportunity at the next term to ask leave, upon cause shown, then to file answer before final judgment passes against him.

In 1 Black on Judgments, section 28 (2 Ed.), it is said:

"An order that a bill be taken *pro confesso* is interlocutory (as in our Code, section 386) and intended to prepare the case for final decree. Its effect is similar to that of a default in an action at common law, by which the defendant is deemed to have admitted all that is well pleaded in the declaration. The defendant has lost his standing in Court and is not entitled to notice of its further proceedings, but the matters set forth in the bill do not pass *in rem judicatam* until the final decree"—which by our Code, section 386, is at the next term, though in most cases (except those sounding in damages) judgment passes at that term as is above stated, without further proof, if the complaint was duly verified. See also, 5 Enc. Pl. & Pr., 989; 6 *Ibid,* 99, 104.

In *Roulhac v. Miller,* 90 N. C., 176, *Smith, C. J.,* notes as an innovation that final judgments "are now allowed" at the return term upon a verified complaint for a money demand, certain in its nature, and italicises the class of cases in which such summary judgment at the first term is committed. That final judgment is authorized only in cases falling under section 385 is again noted in *Brown v. Rinehart,* 112 N. C., 772; *Battle v. Baird,* 118 N. C., 854; *Stewart v. Bryan,* 121 N. C., 46, and *McLeod v. Nimocks,* 122 N. C., 437.

It may be noted here that by chapter 626, Laws 1901, judgment at the return term is further authorized in actions upon a bill, note, bill of exchange, liquidated and settled account, or for divorce," where the summons shall be served and the complaint filed in the Clerk's office "at least thirty days before the term," whereupon the action shall stand for trial at the return term. Except in such cases section 385 still presents the only instance in which the law authorizes a final judgment at the return term, except when judgment is taken in ejectment under The Code, section 237, for failure to file a defense bond. *Jones v. Best,* 121 N. C., 154.

CONNOR, J., dissenting. I regret that I cannot concur in the opinion of the Court in this case. His Honor having found as a fact that a summons was served upon the defendant ten days before the first day of the term and the plaintiff having filed and verified the complaint within the first three days, the defendant was in default in that he filed no answer during the term, nor obtained an extension of time therefor. This presents the question as to the status of the case at the last moment of the term. The several sections of The Code must be read together and so construed as to bring about a harmonious and orderly system of procedure. The plaintiff complied strictly with section 233 of The Code by setting forth in the complaint a concise statement of the facts constituting his cause of action. The defendant within the time fixed should have filed a demurrer or an answer. If a demurrer, he should have set forth his grounds thereof; if an answer, it should have contained a general or specific denial of each material allegation of the complaint controverted by him, or of any knowledge or information thereof sufficient to form a belief, and in addition thereto, if he so desired, any new matter by way of avoidance or counter claim. Upon his failure to do either within the time prescribed it is expressly provided that "Every material allegation of the complaint not controverted by the answer * * * shall for the purpose of action be taken as true." Section 268 of The Code. In this condition of the record the inquiry arises as to what is the next step to be taken. Section 385 provides that, "where complaint sets forth one or more causes of action, each consisting of the breach of an express or implied contract to pay, etc., upon proof of personal service, etc., and upon the complaint being verified, judgment shall be entered at the return term for the amount mentioned in the complaint, etc., and where the defendant, by his answer in such an action, shall not deny the plaintiff's claim,

but shall set up a counter-claim, etc." Section 386 provides that "In all actions, except those mentioned in the preceding section, when the defendant shall fail to answer, and upon a like proof, judgment by default and inquiry may be had at the return term, and inquiry shall be executed at the next succeeding term. If the taking of an intricate or long account be necessary to execute properly the inquiry, the Court, at the return term, may order the account, etc.; in all other cases, the inquiry shall be executed by a jury, unless by consent the Court is to try the facts as well as the law." It is manifest that this section of The Code relates to causes of action for the recovery of money, either by way of damages for breach of contract, or action sounding in tort. It will be observed that this action is neither, but may be assimilated under the practice prevailing prior to the adoption of The Code to a bill in equity to quiet and remove cloud from title. The action is brought under chapter 6 of the Laws of 1893, entitled "An act to determine conflicting claims to real property," and the complaint states a cause of action coming within the terms of this act. In the condition of the pleadings at the last moment of the return term of the Court there was nothing to be tried by a jury, nothing in respect to which inquiry was to be made. As the record then stood, no issues could be formulated because an issue arises "upon a material allegation in the complaint controverted by the answer." Section 393. This leads us to inquire as to the effect of a failure to answer. We find by referring to the practice prevailing prior to the adoption of The Code that "on the expiration of the time for pleading, a rule to plead having been given, and a plea demanded, when necessary the plaintiff's attorney should *search* for a plea, if not delivered to him, with the clerk of the papers who receives special pleas in the King's Bench, and with the clerk of the judgments who keeps the general issue book

at the King's Bench office, or at the prothonotaries' office in the common pleas; and if no plea be delivered or found at either of those offices the plaintiff's attorney may sign judgment as for want of a plea. A judgment by default is *interlocutory or final.* When the action sounds in damages, as in *assumpsit, covenant, trover, trespass,* etc., the judgment is only interlocutory, 'that the plaintiff ought to recover his damages,' leaving the amount of them to be afterwards ascertained. In *debt,* the judgment is commonly *final,* etc." Tidd's Practice, page 563. It will be observed that in almost if not every form of action at common law, except debt, damages were demanded as a part of the recovery, either for the purpose of ascertaining the value of the recovery or as *detinue, trover* and *replevin,* etc., for the value of the property and damages for the detention. It is therefore probable that in every judgment by default, except in debt, the judgment was by default and inquiry. This may not be strictly accurate, but is sufficiently so for the purpose of this discussion. In courts of equity where no answer was filed to the bill it was the privilege of the plaintiff to have a decree *pro confesso.* "The proceeding which is termed taking a bill *pro confesso* is the method adopted by the Court for rendering its process effectual where the defendant fails to appear and answer by treating the defendant's contumacy as an admission of the complainant's case, and by making an order that the facts of the bill shall be considered as true, and decreeing against the defendant according to the equity arising upon the case stated by the complainant." Beach on Modern Eq. Prac., section 191. The mode of procedure in taking the bill *pro confesso* is prescribed by rules of courts. It is only necessary to inquire for the purpose of this discussion as to the effect of the decree *pro confesso* upon the right of the plaintiff to proceed to final decree. If the allegations in the bill are distinct and positive they

may be taken as true without proof. "The defendants are concluded by that decree, so far at least as it is supported by the allegations of the bill, taking the same to be true. Being carefully based on these allegations, and not extending beyond them, it cannot now be questioned by the defendants unless it is shown to be erroneous by other statements contained in the bill itself. A confession of facts properly pleaded dispenses with proof of those facts and is as effective for the purposes of the suit as if the facts were proved, and a decree *pro confesso* regards the statements of the bill as confessed." *Thompson v. Wooster,* 114 U. S., 104. This Court has held in accordance with the rules of practice prevailing in courts of law and equity that "All facts averred in the complaint, and not controverted by the defendant, must be taken as true for the purposes of the action." *Oates v. Gray,* 66 N. C., 442, *Dick, J.,* saying: "The object of The Code was to abolish the different forms of action and the technical and artificial modes of pleading used at common law, but not to dispense with the certainty, regularity and uniformity which are essential in every system adopted for the administration of justice. The plaintiff must state his cause of action with the same substantial certainty as was formerly required in a declaration; and the defendant must controvert the allegations of the complaint, or they will be taken as true for the purposes of this action." The Constitution has not abolished the principles of equity, indeed it could not; on the contrary it fully recognizes them, and they must be applied as far as may be under the existing statutory method of procedure, but when that is silent and inadequate, by the method and practice of the late court of equity in this State. *Morisey v. Swinson,* 104 N. C., 555. It has been further held that by a failure to deny the allegations in the answer, the fact is admitted and the effect of the admission is as available to the plaintiff as if found by

the jury. *Bonham v. Craig,* 80 N. C., 224. Or, as is said in *Cook v. Guirkin,* 119 N. C., 13, has the same force and effect as a finding of the jury.

After a default the defendant may not be heard to deny any facts set forth in the complaint, but he may be heard in respect to the judgment or decree tendered by the plaintiff upon his complaint. The plaintiff may have upon the failure to answer the complaint such judgment as upon the facts stated he is entitled to, and the defendant may be heard to object to the form of the judgment tendered. The failure to answer does not admit that he is entitled to the relief demanded, but that he is entitled to such relief as the law gives him upon the facts alleged. This Court in *McLeod v. Nimocks,* 122 N. C., 437, says: "The defendant does not complain of that part of the judgment which institutes an inquiry as to the damages which the plaintiff may have sustained by reason of the matters set out in the complaint, but he insists that the judgment by default final, for the conversion of the cotton and embezzlement of the proceeds, is such a judgment as could not have been rendered under section 386 of The Code. We think his contention not well founded. The action sounded in damages and was for a *tort.* The tortious conduct of the defendant was set forth in the complaint as the basis for demanding the damages. The judgment by default and inquiry, the defendant having said nothing in answer to the plaintiff's complaint, was conclusive that the plaintiff had a cause of action against the defendant of the nature declared in the complaint, and would have been entitled to nominal damages without any proof. *That* cause of action was admitted by the defendant's failure to answer." Here no damages were demanded and there was nothing to submit to the jury, the facts alleged in the complaint having been admitted by the failure to answer. We therefore think, that upon failure to answer, the plain-

tiff was entitled to such relief in accordance with the facts stated in the complaint, and that by failure to answer the defendant could not call upon the plaintiff to make proofs of these facts. It would be a strange result if the new Code of Procedure, the purpose of which is to simplify and expedite remedial justice, should work out this result. That the plaintiff may take judgment in an action of this kind for want of an answer is shown by section 2 of chapter 6 of the Laws of 1893, "that if a defendant in such action shall disclaim in such answer any interest in the estate or property or suffer judgment to be taken against him in such answer, plaintiff could not recover cost."

An examination of the complaint and judgment develops the fact that in this respect the judgment is erroneous, in that it taxes the defendant with the cost. The judgment is strictly in conformity to the relief to which the plaintiff is entitled upon the facts set forth in his complaint. The plaintiff alleges that one Lasker was, on October 14, 1899, the owner of the land in controversy. That on said day he executed a mortgage containing power of sale, which was duly recorded October 23, 1899; a certified copy of the mortgage is attached to the complaint. That said mortgage was given to secure a note of $25,000 due on October 14, 1902, with interest from date of payment quarterly, and that upon default in payment of interest the power of sale should be executed. That on April 8, 1901, the mortgagee, pursuant to the power of sale, there having been default in the payment of interest, sold the land after advertisement, etc., and that plaintiff purchased, paid the purchase-money and took deed therefor; a certified copy of the deed is attached to the complaint. That after the execution and registration of the mortgage certain judgments were recovered and docketed against said Lasker. That the defendant had execution issued on said judgment, and after the sale under the

mortgage, August 11, 1902, had the land sold and purchased at said execution sale and took deed from the sheriff therefor; a certified copy of the deed is attached to the complaint. That at the time of issuing said execution the judgment debtor was dead. That the plaintiff claims title to said land under said sheriff's deed, etc. That said deed is a cloud upon plaintiff's title. These facts being admitted by the failure to answer, there can be no possible doubt of plaintiff's right to the relief demanded, under chapter 6, Laws 1893. *Daniel v. Fowler,* 120 N. C., 14; *Rumbough v. Mfg. Co.,* 129 N. C., 9; Bispham Eq., section 474; Beach Modern Eq., 556, 558. The question is important to the courts and to the profession. I am quite sure, from an experience on the Superior Court bench and at the bar, that in all actions for the recovery of property, when no damages are claimed, or when it is not necessary to assess the value of the property, as well as in actions for relief formerly sought in courts of equity fixing rights of property, etc., it is and has been for many years the custom to take judgment by default final in accordance with the facts stated in the verified complaint. The law as held by the Court in this case will render many judgments taken in accordance with the course and practice of the Court irregular, and I cannot but think seriously delay and embarrass the administration of remedial justice. By simply standing mute the defendant can in actions of this character, and others in which no damages or an uncertain amount is demanded, put the plaintiff to the expense and annoyance of proving the allegations of his complaint. I must confess, with all deference, that I would be at a loss to know what issue should be submitted to the jury in this case. There is not a material allegation of the complaint controverted. Should an issue be submitted upon each allegation as if denied, or the general issues? I think great confusion must ensue from the construction put upon

the several sections of The Code. There is another view of this case upon which I think the judgment of his Honor should be affirmed, conceded that the judgment is irregular in the respect pointed out by the Court. It is held by this Court that such a judgment will not be set aside unless the defendant sets forth facts showing *prima facie* a valid defense, and the validity of the defense is for the Court and not with the party. *Jeffries v. Aaron,* 120 N. C., 167. The defendant based his motion to set this judgment aside upon the ground that the summons was not served on him ten days before the first day of the term. After a war of affidavits, which I have examined, his Honor, it seems to me, could not have done otherwise than refuse the motion. In the case on appeal it is stated that the defendant did not at any time request the Court to find any of the facts set forth in the affidavit except as to the date of the summons. He attached to his original affidavit an answer which he proposed to file. An examination of it shows that although he denies, as of his own knowledge, the existence of documents, papers and records, of which it is difficult to understand how he could be ignorant, he does not really, and seriously he does not really, taking his entire answer, set up any substantial defense to the action. He swears to many legal conclusions, such as that the mortgage and deed of the plaintiff are void, for that he says in his brief there is no allegation that they were stamped, and it does not so appear from the copies taken from the registry. I cannot think that from any point of view the plaintiff should be put to further test or trouble in this case.

This Court has frequently held that an irregular judgment may be set aside at any time. The safety of titles to property dependent upon the validity of such judgment was secured by the principle announced in *Jeffries v. Aaron, supra,* which seems to be overruled by the decision in this

case. I cannot but think that the doctrine now announced will endanger many titles, as in suits for foreclosure of mortgages and many other actions affecting title to land. The case of *Jeffries v. Maron* cannot be distinguished from the one before us. It is a motion to set aside a judgment by default final upon an open account. *Faircloth, C. J.*, says: "The motion is not put upon the ground of mistake, surprise or excusable neglect." This Court reversed the Court below, setting aside the judgment. See also, *Stancil v. Gay*, 92 N. C., 455; *Peoples v. Norwood*, 94 N. C., 167.

I cannot think that from any point of view the plaintiff should be put to further test or trouble in this case.

WALKER, J., concurs in the dissenting opinion.

IN RE BRIGGS.

(Filed April 19, 1904).

CONTEMPT—*Witnesses—Const. U. S., Fifth Amendment—The Code, sec. 1215—Const. N. C., Art. I, sec. 11—Gaming—Pardons.*

The Code, sec. 1115, requiring a witness to testify touching any unlawful gaming done by himself or others, is not unconstitutional by reason of the fifth amendment to the constitution of the United States or Art. I, sec. 11, of the constitution of North Carolina, for the reason that the said statute grants a pardon to the witness.

IN THE matter of R. G. Briggs, heard by *Judge Frederick Moore*, at September Term, 1903, of the Superior Court of WILSON County.

This is an appeal from a judgment for contempt from *Moore, J.*, at February Term, 1904, Wilson Superior Court. In the case of *State v. George Morgan*, who was indicted for

keeping a gaming house, with a second count for playing cards for money in violation of chapter 29, Laws 1891, R. G. Briggs was sworn as a witness for the State. The Solicitor asked the witness: "1. Have you been in the defendant's room on the west side of Goldsboro street, in Wilson, N. C., within the last two years?" The witness stated that he declined to answer the question, on the ground that his answer might tend to criminate him. Before the witness finally declined to answer this question, the Solicitor asked him the following additional questions: 2. "Describe the room." 3. "Have you within the last two years seen a game of cards played in the defendant's room for money or other thing of value in which you did not participate?" 4. "Have you within the last two years seen a game of cards played in the defendant's room for money or other thing of value in which you did participate?" The witness declined to answer each and every of these questions for the reason first given. The Court being of opinion that under section 1215 of The Code the witness is not privileged from answering the questions and all pertinent questions relating to the charge against the defendant, but should be compelled to answer, informed the witness that he must answer the questions. The witness again declined to answer. Whereupon the Court adjudged the witness guilty of a contempt of Court and imposed a fine upon him and ordered him in custody of the Sheriff until the fine was paid. The witness excepted and appealed.

Robert D. Gilmer, Attorney-General, for the State.
John E. Woodard, for the respondent.

CLARK, C. J. Section 648 of The Code provides that "any person guilty of any of the following acts may be punished for contempt: 6. The contumacious and unlawful refu-

sal of any person to be sworn as a witness, or, when so sworn, the like refusal to answer any legal and proper interrogatory."

The fourth question was, "Have you within the last two years seen a game of cards played in the defendant's room for money or other thing of value in which you did participate?" As already stated, the witness declined to answer, on the ground that his reply would tend to criminate him. The Court being of opinion that under The Code, section 1215, the witness was not privileged from answering this or any other pertinent questions relative to the charge against the defendant, directed the witness to answer, and upon his refusal adjudged him in contempt and imposed a fine and ordered him into custody until it was paid, from which judgment and order the respondent appealed.

The Code, section 1215, is as follows: "No person shall be excused on any prosecution from testifying touching any unlawful gaming done by himself or others; but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him." The respondent contends that this statute is unconstitutional, in that,

(1) It violates the Fifth Amendment to the Constitution of the United States, which provides that "no person * * * shall be compelled in any criminal case to be a witness against himself."

We have already at this term, in *State v. Patterson,* 134 N. C., 612, called attention to the well-known historical fact that the first ten amendments were passed as restrictions solely upon the Federal Government and courts, and that the United States Supreme Court has uniformly held that they do not apply to the State governments or courts. In *Barron v. Baltimore,* 32 U. S., 243, *Marshall, C. J.*, refer-

ring to the first eleven amendments, said: "These amendments contain no expression indicating an intention to apply them to the State governments. This Court cannot so apply them." This, repeatedly and uniformly, has been so held by that Court ever since, and among the cases are *Peryear v. Comrs.*, 72 U. S., 480; *Twitchell v. Comrs.*, 74 U. S., 325; *U. S. v. Cruikshanks*, 92 U. S., 552; *Presser v. Ill.*, 116 U. S., 265; *Spies v. Ill.*, 123 U. S., 166, in which it is said that it is well settled that the first ten amendments to the Federal Constitution were not intended to limit the powers of the States. *Hollinger v. Davis*, 146 U. S., 319, and numerous other Federal and State decisions collected in 3 Rose's Notes to the U. S. Reports, 368—372, and 6 *Ibid.*, 986, 987.

2. That the statute (section 1215) violates Article I, section 11, of the Constitution of North Carolina, which declares that no person shall "be compelled to give evidence against himself." The same point of alleged unconstitutionality has been repeatedly presented in State and Federal courts as to similar statutes, and the ruling has generally been that even where the statute merely provides that the evidence elicited from the witness cannot be used against him, he can be required to testify. *State v. Quarles*, 13 Ark., 307; *Wilkins v. Malone*, 14 Ind., 153; *Ex-parte Buskett*, 106 Mo., 602, 14 L. R. A., 407, 27 Am. St. Rep., 378, and cases therein cited; *Kneeland v. State*, 62 Ga., 395; *People v. Kelly*, 24 N. Y., 74.

There are cases which hold that he cannot be required to testify unless total immunity is guaranteed him, because clues may be discovered by the evidence which may be followed up to the prisoner's subsequent conviction without putting in evidence his declarations made when a witness. *Smith v. Smith*, 116 N. C., 387; Emery's case, 107 Mass., 172, 9 Am. Rep., 22. But when, as in our State, the statute

provides that the witness in such case shall have absolute immunity from punishment in regard to his participation in the offense as to which he has been required to testify, the rule is universal that he may be compelled to testify. Among the cases clearly stating this are *Hirsch v. State,* 67 Tenn., 89; *Warner v. State,* 81 Tenn., 52; *State v. Nowell,* 58 N. H., 314; *People v. Foundry* (1903), 201 Ill., 236. In our own State the point here presented was decided and the witness was required to answer in *La Fontaine v. Underwriters,* 83 N. C., 132, and *State v. Morgan,* 133 N. C., 743, in which last it is said that the witness "was properly made to answer the questions. The Code, section 1215." This was said as to another witness in this same case.

Though the Fifth Amendment to the United States Constitution does not apply to the State courts, that amendment is so nearly in the words of the similar provision in the State Constitution that the above distinction cannot be more clearly indicated than by reference to two well-known decisions of the United States Supreme Court. In *Counselman v. Hitchcock,* 142 U. S., 457, the protective statute (U. S. Rev. Stats., 860) was merely that "no evidence given by the witness shall be in any manner used against him in any court of the United States in any criminal proceeding," and it was held that the witness was not compelled to answer, for the statute fell short of the constitutional provision in that the disclosure of the circumstances, sources and means of the offense might be used effectually in a subsequent prosecution against the witness for his participation in that very offense, without using his answers on the witness stand as evidence against him on his trial. That case cites (p. 579) the decision in *La Fontaine v. Underwriters,* 83 N. C., 132, as based upon a statute (The Code, section 1215) giving such full and complete protection that the witness could properly be required to testify.

In *Brown v. Walker,* 161 U. S., 591, Congress had, under the intimation in *Counselman v. Hitchcock, supra,* amended the law by chapter 83 (1893), 27 St., 443, which provided that the witness required to testify in the cases designated should not "be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matters or things, concerning which he may testify." This was held to give absolute immunity against prosecution for the offense to which the questions related and deprived the witness of his constitutional right to refuse to answer. The Court said (p. 595) that if this were not so, "the practical result would be that no one could be compelled to testify to a material fact in a criminal case, unless he chose to do so, or unless it was entirely clear that the privilege was not set up in good faith." The Court cites authorities (pp. 598, 599) that if prosecution would be barred as to the witness by the statute of limitation or a pardon he would not be privileged to refuse to answer, and says this statute gives him the same protection and deprives him of the privilege which he no longer requires for his protection.

Our statute, The Code, section 1215, is more explicit than the Federal statute passed upon in *Brown v. Walker, supra.* It provides that the evidence adduced shall not be used against the witness "in any penal or criminal prosecution, and he shall be *altogether pardoned of the offense so done* or *participated in by him.*" In *State v. Blalock,* 61 N. C., 242, this Court sustained an act of the Legislature granting "amnesty and pardon," and speaks of "special pardons" and general pardons by legislative act. In *State v. Keith,* 63 N. C., at page 143, the Court recognizes again the validity of a pardon by legislative enactment, citing 4 Blk., 401, and *Marshall, C. J.,* in *U. S. v. Wilson,* 32 U. S., 163, who state that the courts must take judicial notice of a pardon by act of Parliament because it is considered a pub-

lic law, having the same effect as if the general law punishing the offense had been repealed or amended. It was evidently held in *State v. Blalock*, and *State v. Keith*, *supra*, that Article III, section 6, of the Constitution, conferring on the Governor the power to grant reprieves, commutations and pardons, after conviction, for all offenses (except in cases of impeachment) "was not the grant of an exclusive power and did not deprive the General Assembly of the power to pass special or general acts of pardon, like the English Parliament, even before conviction." The same view is expressed in *Brown v. Walker*, 161 U. S., at page 601, which holds that a similar act of Congress "securing to witnesses immunity from prosecution is virtually an act of general amnesty and within the power of Congress, although the Constitution vests in the President 'power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.'" The Court further says, citing *Knot v. U. S.*, 95 U. S., 152, that the distinction between amnesty and pardon is of no practical importance, and that the decisions in this country and in England, as to the legislative power to grant pardons, with one or two exceptions in this country, are unanimous in favor of their constitutionality.

The witness was properly required to answer.

Whether the ruling below on the facts of this case should be presented for review by *habeas corpus* or by appeal is a question not raised by any exception and we do not think we should discuss the point *ex mero motu*.

The judgment below is affirmed.

Douglas, J., concurring. I am *in limine* with the vital question as to the defendant's right of appeal. If he has no right of appeal it makes no difference what questions might be decided if the appeal were entertained. Under the facts

of this case and the principles of law applicable thereto, I think the defendant has a right of appeal.

In fact, under all the circumstances, we think this the proper and most convenient proceeding in the case at bar. It is true the defendant, properly so called as this is a criminal prosecution, might sue out a writ of *habeas corpus,* but this course might be liable to grave inconveniences. One Judge of the Superior Court might feel great hesitation in annulling the judgment of another Judge, especially in a matter so nearly affecting the integrity of the Court. If the writ were issued by a member of this Court returnable before himself the same hesitation might exist, though perhaps to a less degree; while to make the writ returnable before a full bench would be too cumbersome to ensure prompt and adequate relief, as is hereinafter shown. A writ of *certiorari* might be equally inadequate. Much stress is laid upon the delay resulting from an appeal. A writ of *certiorari* would, and a writ of *habeas corpus* might, cause the same delay. It should be borne in mind that the defendant appeals at his peril. If this Court affirms the judgment of the Court below his sentence will remain in full force and effect. In any event, I think he is entitled to prosecute his appeal, and the fact that it will avail him nothing is no legal reason for its denial.

The Constitution (Article IV, section 8) says that "The Supreme Court shall have jurisdiction to review, upon appeal, *any* decision of the Courts below, *upon any matter of law or legal inference,* * * * and the Court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts." Section 945 of The Code is in the exact words of the said section of the Constitution. As far as I can see, no distinction is made either in the Constitution or the statute as to cases of contempt. "Any matter of law

or legal inference" are terms of most direct and comprehensive meaning, and, if they mean anything, mean what they say.

It must follow that in all cases of contempt where any question of law is involved, the defendant, for such he becomes when attached for contempt, is entitled to an appeal to this Court. The only possible ground upon which he can be denied an appeal is that of absolute necessity, and it is clear that such a principle can never extend beyond the necessity that alone brought it into existence. *Necessitas non habet legem,* or as it is perhaps more properly stated, *necessitas vincit legem,* is a maxim which, however beneficial in some cases, is in its ultimate tendency destructive of all law and therefore should be rarely invoked. I am not partial to maxims which tend to abridge the liberty of the citizen or to deprive him of the equal protection of the law.

I am aware of the distinction attempted to be made in some jurisdictions between civil and criminal contempts, but I must confess that this classification is by no means clear, and has not always been rendered clearer by the learning of the books. Learning is not always wisdom. I am also aware of the distinction created in this State between *contempt* and *as for contempt,* and the decisions of this Court that in the latter class of cases an appeal will lie, while it will not in the former. This ruling, which has no foundation in the statute, arises purely *ex necessitate*, and is based upon the inherent right of self-defense attaching to the Court as well as to the individual. Therefore the power of summary punishment can never exceed the limits of the necessity, and in dealing with the liberty of the citizen this necessity must be actual and not constructive. The individual has inherent rights as well as the Court, and it was primarily for the protection of those rights that Courts themselves were instituted. The old idea that the individual

is a mere atom of the State, having no rights except those that have been granted to him by the sovereign, has no application in this country. Here the State is the creature of the citizen, who holds his personal rights inherently and inalienably.

We will freely admit that if the conduct constituting the contempt is such as to actually obstruct the business of the Court, as in Mott's case, no appeal would lie, as the consequent delay would prevent the prompt action rendered absolutely necessary for the protection of the Court. But where a man creates no disturbance whatever, and is guilty of no act which can be construed into contempt beyond a respectful insistence upon a constitutional right, he is in our opinion entitled to an appeal by every just principle of law. What other protection can he have? It has been suggested that he might obtain a writ of "*habeas corpus* issued probably by one member of this Court before the full bench." I am not aware of any such provision of law; but suppose it were so, would it give him an adequate remedy? He would be compelled to go to jail until he could reach a member of this Court, and remain in jail until the next term of this Court if it were not then in session. Was it ever contemplated that the great prerogative writ of *habeas corpus* should be disposed of in any such manner? What good would it do the defendant if his petition were not heard until after the expiration of his term of imprisonment? So far I have relied upon the reason of the thing. "Reason," says Coke, "is the soul of the law; the reason of law being changed, the law is also changed." We think, however, that an examination of the statutes and the decisions of this Court will show that in this case reason and authority point to the same conclusion.

The contention of the State seems to be based entirely upon section 648 of The Code, apparently ignoring section

654, which provides that courts "shall have power to punish *as* for contempt (4) all persons summoned as witnesses in refusing or neglecting to obey such summons to attend, be sworn or *answer* as such witness." Such refusal comes under section 648 only when it is "the *contumacious* and *unlawful* refusal to answer any *legal* and *proper* interrogatory." To make a person guilty of contempt under that section, the question must be both legal and proper, and the answer both unlawful and contumacious. Admitting that the questions were all proper, and the defendant's refusal to answer consequently unlawful, there is no evidence whatever that such refusal was contumacious. The Court below evidently did not consider it so, because it fined the defendant one dollar. It is true that the provision of section 650 that "the Court shall cause the particulars of the offense to be specified on the record," does not of itself give to the defendant the right of appeal; but it does give to this Court the means of ascertaining whether or not the appeal was properly taken. It is evident that any refusal of a witness to answer must necessarily be in the immediate presence of the Court, and yet when not contumacious it is punishable only *as* for contempt under section 654. The refusal of the witness to answer did not in any way tend to disturb the proceedings of the Court, or even necessarily cause a continuance of the case, as the State might have proceeded without his testimony. At most, it could only have caused such delay as results from any other appeal. He could cause the same delay by going to jail and applying for a writ of *habeas corpus,* as suggested in the contentions of the State; or he could cut the gordian knot by failing to attend. In the latter event he could be punished only *as* for contempt with the admitted right of appeal. I am assuming that the witness *unlawfully* refused to answer. If his refusal had been lawful and proper, then no power on earth should compel

him to answer. In *In re Bonner,* 151 U. S., 242, the Supreme Court of the United States has well said that "The law of our country takes care, or should take care, that not the weight of a judge's finger shall fall upon any one except as specifically authorized.

A brief review of the cases relied upon by the State I think will sustain the view I entertain in this case. In *State v. Woodfin,* 27 N. C., 199, 42 Am. Dec., 161; *State v. Mott,* 49 N. C., 449, and *Ex-parte Summers,* 27 N. C., 149, the offenses were committed *in facie curiæ*, the two former being fights, and the last a positive refusal in contemptuous language to return process after the direct order of the Court. *Scott v. Fishblate,* 117 N. C., 265, 30 L. R. A., 696, was a civil action for damages and did not involve the right of appeal. In the cases of *In re Daves,* 81 N. C., 72; *In re Deaton,* 105 N. C., 59; *State v. Aiken,* 113 N. C., 651, and *In re Robinson,* 117 N. C., 533, 53 Am. St. Rep., 596, the appeal was entertained and the judgment of the Court below was reversed and set aside. *In re Gorham,* 129 N. C., 481, the judgment was specifically affirmed. *In re Daves,* 81 N. C., 72, this Court says, on page 75: "The plaintiff insists that an appeal does not lie from a judgment imposing a penalty for contempt. This is true as to that class of contempts which are committed in the presence of the Court, or so near as to interfere with its business, and the reasons for which are justly set out by *Nash, C. J.,* in the opinion in *State v. Mott,* 49 N. C., 449. But in cases like the present, where the right to punish depends upon a 'willful disobedience' of 'any process or order lawfully issued,' the lawfulness of the power exercised is a proper subject of review in this Court." Why does not this decision apply to the case at bar, where the right to punish for contempt under section 648 depends upon the "contumacious and unlawful" refusal of the witness to answer any "legal and proper interroga-

tory?" The State in the case at bar, as the Court has done in some cases, lays great stress upon the reasons given by *Nash, C. J.*, in *State v. Mott*. What are those reasons? This Court has well said in *Walton v. Gatlin*, 60 N. C., 310: "When the stream becomes too muddy to see the bottom the surest way to find truth is to go up to the fountain head, that is, 'to the reason and sense of the thing.'" In Mott's case *Nash, C. J.*, speaking for the Court, says (49 N. C., page 50): "For good reasons the law does not authorize an appeal in such cases. To constitute a contempt the act done must be in the presence of the Court, or so near thereto as to obstruct the administration of justice. From the nature of the offense it is difficult to see how another Judge can estimate the nature of the act. The evil requires prompt action to its removal. Let us suppose a case: A man comes into court and by his noisy behavior obstructs the business; the Judge orders him to be fined and imprisoned for the contempt; the delinquent appeals to the Court above; the appeal of course annuls the judgment; but the individual remains in the court-house and still continues his disorderly conduct; the Court again interferes by a judgment of fine and imprisonment, and again the right of appeal is interposed, and so on, as long as the obstinacy and folly of the trespasser continues, to the entire suspension of the public business and in utter contempt of the judicial authority." Do any of these reasons apply to the case at bar? If not, then why should we follow the decision in that case as an authority?

I come now to a consideration of the case upon its merits, and we find no difficulty in arriving at a conclusion. I do not see how the first question could tend to criminate the witness, and we might place our affirmance of the judgment upon his failure to answer it alone; but as he was asked all the questions at the same time, and the action of the Court below is founded upon his refusal to answer all

the questions, I deem it proper to consider them. Indeed, it would seem that the propriety of the last question is the real matter sought to be determined in this appeal. It certainly presents its most important phase.

I think that all the questions should have been answered by the witness, including the one involving his own participation, although it does not appear that the Court informed him of the protection afforded by the statute as clearly as perhaps he should have done.

The Constitution of this State, in section 11 of Article I, provides that: "In all criminal prosecutions every man has the right to be informed of the accusation against him, * * * and not be compelled to give evidence against himself."

The scope of this protection is explained by this Court in *Smith v. Smith,* 116 N. C., 386, as follows: "We think the provisions of our Constitution ought to be liberally construed to preserve personal rights and to protect the citizen against self-incriminating evidence. It is conceded and settled that a single unlawful act of sexual intercourse is not a criminal offense, but the question presented is, would the admission by the witness of a single act tend to criminate him? Our opinion is that it does, and that the witness ought not to be compelled to answer the question, for the reason that the admission may be the connecting link of a chain of evidence disclosing other facts and other circumstances leading to clear proof of a crime which would not have been known without the admission. The usual reply is that his admission cannot be used against him in any future prosecution, and that he is therefore protected. This fails to reach the mark, for although it cannot be used against the witness, it may be the means, the link by which other sufficient evidence has been discovered which could not have been done without the admission. No one knows what facts and secrets

are locked up in the bosom of a witness, and we think the true intent of the Constitution is that the witness shall not be compelled to disclose anything that may lead to criminal conduct without absolute protection against future prosecution."

Section 1354 of The Code provides that: "Nothing in this chapter, except as provided in the preceding section, shall render any person compellable to answer any question tending to criminate himself." Section 1353 has no bearing upon the question before us. Hence it follows that were it not for section 1215 of The Code the fourth question, and perhaps the second and third, would be incompetent under the laws as well as the Constitution of this State. Section 1215 is as follows: "No person shall be excused, on any prosecution, from testifying touching any unlawful gaming done by himself or others; but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him."

The constitutionality of this section depends upon whether it gives to the witness the full measure of his constitutional protection. Its wording is not the best that might be selected to express its legal effect; but I think that it is sufficiently clear to justify our conclusion that it protects the witness from any prosecution or molestation of any kind on account of any offense concerning which he may be required to testify. Anything less than this would fail to give him adequate protection, and hence would fail to meet the constitutional requirement.

Whether the Legislature could grant pardons in analogy to the English Parliament is not before us; but there can be no doubt of its authority to pass acts of amnesty relating to certain classes of offenses. This power rests equally in reason and authority, its exercise being occasionally

demanded by dominating necessities of public policy. This is clearly recognized in the cases of *State v. Blalock,* 61 N. C., 242, and *State v. Keith,* 63 N. C., 140. The latter case, holding that an act of amnesty was not only valid, but created a vested right of immunity which could not be repealed even by a constitutional convention, was decided in 1869 by a court, all of whose members had been elected at the same election at which the Constitution itself was adopted, and one of whose Justices was a distinguished member of the convention which framed the Constitution. If the oft-cited principle of contemporaneous construction has any force, it is peculiarly applicable to that case, in which occurs the celebrated sentence: "These great principles are inseparable from American government and follow the American flag." See also, *State v. Morgan,* 133 N. C., 743.

It has been repeatedly held that the Fifth Amendment to the Federal Constitution is a restriction only upon the power of the United States, and not upon that of the States; but its provisions in this respect are so nearly identical with those of our own Constitution that the decisions thereon may well be cited in analogy. The said amendment provides that "No person shall be compelled in any criminal case to be a witness against himself." Its scope was stated by *Chief Justice Marshall* when presiding at the trial of Aaron Burr, as follows: "Many links," he says, "frequently compose that chain of testimony which is necessary to convict an individual of crime. It appears to the Court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself and, to every effectual purpose, accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. The fact of itself would be unavailing, but all other facts, without it, would be

insufficient. While that remains concealed in his own bosom he is safe; but draw it from thence and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description."

The question as to how far Congress may deprive a witness of his constitutional privilege of refusing to testify, by protecting him from the consequence of his testimony, has been fully and elaborately discussed by the Supreme Court in several cases, and especially in *Boyd v. U. S.,* 116 U. S., 616; *Counselman v. Hitchcock,* 142 U. S., 547; and *Brown v. Walker,* 161 U. S., 591.

Section 860 of the Revised Statutes, taken from the Act of February 25, 1868 (15 Stat. U. S., 37, c. 13), was as follows: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture."

In Counselman's case the Court held that the witness could not be compelled to testify because the protection afforded by the statute was not equivalent to that of the Constitution. It says, on page 585: "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the consti-

tutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. In this respect we give our assent rather to the doctrine of Emery's case, in Massachusetts, than to that of *People v. Kelly,* in New York; and we consider that the ruling of this Court in *Boyd v. United States, supra,* supports the view we take. Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."

In view of this decision, Congress passed the Act of February 11, 1893 (27 Stat. U. S., 443, c. 83). It was held in *Brown v. Walker,* 161 U. S., 591, that the act deprived the witness of his constitutional right to refuse to answer, inasmuch as it afforded absolute immunity against prosecution, Federal or State, for the offense to which the question related. It is interesting to note that this case was decided by a bare majority of the Court, *Justices Field, Shiras, Gray* and *White* dissenting on the ground of the absolute sanctity of the constitutional provision.

While I am deeply impressed with the force of the dissenting opinions in that case, I feel compelled to hold, on grounds of the highest public policy, that the witness may be required to testify where the statute affords him in fact as well as in theory absolute immunity from prosecution or molestation of any kind on account of all transactions referred to in his involuntary testimony.

At the same time I feel the full responsibility of holding that in any case constitutional provisions securing the rights and liberties of the citizen can be changed or modified by legislative enactment. I realize the danger pointed out by the Supreme Court of the United States in *Boyd v. U. S.*

(116 U. S., 616), where it says: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

The above opinion, written tentatively before the opinion of the Court assumed its present shape, is now filed as an expression of my individual views. Speaking for myself, it is perhaps proper to add that my views of the protection afforded by Article I, section 11, of the Constitution of this State are somewhat broader than those generally adopted by the courts, though held by some distinguished jurists. I believe there is something dearer to the human heart than the mere money involved in a fine, something more terrible even than going to jail. To compel a man to reveal the innermost secrets of his life that would destroy his reputation, render him infamous in the eyes of his fellow-men, or tend to break up a happy home, might inflict suffering upon the innocent as well as the guilty equal to any punishment known to the law. Tears shed by a faithful wife over a dishonored bed are bitterer than those over an honored grave.

Among the great jurists who have expressed similar views, I will quote but one extract from the dissenting opinion of *Justice Field* in *Brown v. Walker,* 161 U. S., 591, where he

says, on page 631: "The amendment also protects him from all compulsory testimony which would expose him to infamy and disgrace, though the facts disclosed might not lead to a criminal prosecution. It is contended, indeed, that it was not the object of the constitutional safeguard to protect the witness against infamy and disgrace. It is urged that its sole purpose was to protect him against incriminating testimony with reference to the offense under prosecution. But I do not agree that such limited protection was all that was secured. As stated by counsel of the appellant, 'it is entirely possible, and certainly not impossible, that the framers of the Constitution reasoned that in bestowing upon witnesses in criminal cases the privilege of silence when in danger of self-incrimination, they would at the same time save him in all such cases from the shame and infamy of confessing disgraceful crimes and thus preserve to him some measure of self-respect.' * * * It is true, as counsel observes, that 'both the safeguard of the Constitution and the common law rule spring alike from that sentiment of personal respect, liberty, independence and dignity which has inhabited the breasts of English-speaking people for centuries, and to save which they have always been ready to sacrifice many governmental facilities and conveniences. In scarcely anything has that sentiment been more manifest than in the abhorrence felt at the legal compulsion upon witnesses to make confessions which must cover the witness with lasting shame and leave him degraded both in his own eyes and those of others. What can be more abhorrent * * * than to compel a man who has fought his way from obscurity to dignity and honor to reveal crimes of which he had repented and of which the world was in ignorance.' "

In the case at bar none of the questions tend to subject the witness to infamy or disgrace. However dangerous in its tendencies and demoralizing in its results, gaming is not gen-

erally regarded as disgraceful in this State. I do not intend by this statement to justify gambling in the slightest degree, but my duty to the defendant requires me to state facts as they are, no matter how abhorrent to my personal sense of moral obligation.

I must confess some hesitation in conceding that the doctrine of statutory substitution can ever apply to constitutional guarantees, and I am induced to do so in this case only upon controlling principles of public policy, and upon the assurance that absolute immunity is guaranteed to the witness. It is significant that the case of *Brown v. Walker* was decided by a bare majority of the Court, *Justices Field, Shiras, Gray* and *White* dissenting in most vigorous terms, on the ground that no statute requiring the witness to testify could be, legally or in fact, the full equivalent of the constitutional protection of absolute silence. *Justice Field* says, on page 630: "The constitutional amendment contemplates that the witness shall be shielded from prosecution by reason of any expressions forced from him whilst he was a witness in a criminal case. It was intended that against such attempted enforcement he might invoke, if desired, and obtain, the shield of absolute silence. No different protection from that afforded by the amendment can be substituted in place of it. The force and extent of the constitutional guarantee are in no respect to be weakened or modified, and the like consideration may be urged with reference to all the clauses and provisions of the Constitution designed for the peace and security of the citizen in the enjoyment of rights or privileges which the Constitution intended to grant and protect. No phrases or words of any provision, securing such rights or privileges to the citizen, in the Constitution are to be qualified, limited or frittered away. All are to be construed liberally that they may have the widest and most ample effect. No compromise of phrases can be made by which one of

less sweeping character and less protective force in its influences can be substituted for any of them. The citizen cannot be denied the protection of absolute silence which he may invoke, not only with reference to the offense charged but with respect to any act of criminality which may be suggested."

Justice Shiras, with the concurrence of *Justices Gray* and *White*, says, on page 610: "It is too obvious to require argument that when the people of the United States, in the Fifth Amendment to the Constitution, declared that no person should be compelled in any criminal case to be a witness against himself, it was their intention not merely that every person should have such immunity, but that his right thereto should not be divested or impaired by any act of Congress."

Again the same Justices say, on page 621: "As already said, the very fact that the founders of our institutions, by making the immunity an express provision of the Constitution, disclosed an intention to protect it from legislative attack, creates a presumption against any act professing to dispense with the constitutional privilege."

Again they say, on page 627: "If, indeed, experience has shown, or shall show, that one or more of the provisions of the Constitution has become unsuited to affairs as they now exist, and unduly fettered the courts in the enforcement of useful laws, the remedy must be found in the right of the nation to amend the fundamental law, and not in appeals to the courts to substitute for a constitutional guaranty the doubtful and uncertain provisions of an experimental statute.

"It is certainly speaking within bounds to say that the effect of the provision in question as a protection to the witness is purely conjectural. No Court can foresee all the results and consequences that may follow from enforcing this law in any given case. It is quite certain that the witness is compelled to testify against himself. Can any Court be

certain that a sure and sufficient substitute for the constitutional immunity has been supplied by this act; and if there be room for reasonable doubt, is not the conclusion an obvious and necessary one?"

They conclude by saying, on page 628: "But surely no apology for the Constitution, as it exists, is called for. The task of the courts is performed if the Constitution is sustained in its entirety, in its letter and spirit.

I am deeply impressed with the meaning of those words, and whenever I give my assent to any statutory substitution it is only upon the condition that it gives to the witness an equal protection which *is always completely within his reach.*

WALKER, J., concurring. The correctness of the views expressed in the opinion of the Court, as written by the *Chief Justice,* has been demonstrated both by principle and authority. The question as to the respondent's right of appeal is not presented on this record. It appears to me, after careful consideration of the facts as they are shown in the transcript, that the case was brought here only for the purpose of having construed the statute (The Code, section 1215), which provides as follows: "No person shall be excused, on any prosecution, from testifying touching any unlawful gaming done by himself or others; but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him." While the Judge finds that the witness was "contumacious" in refusing to answer, it is evident that he did not intend to use that word in the sense that the witness was actually disrespectful to the Court and refused obstinately and perversely, or without any reason, to answer the question after the law had been fully explained and made clear to him. There appears to have been some doubt enter-

tained in the Court below as to the true construction of the statute, and the formal finding of facts was made in order to obtain the opinion of this Court as to the law and to have a final and authoritative interpretation of section 1215 of The Code, so that there may be no doubt in the future as to whether or not a witness is fully protected in answering any question which would otherwise tend to criminate him. This conclusion is justified not only by the manner in which the finding is stated but by the fact that only a nominal fine, one dollar, was imposed upon the witness. In view of this state of the record it seems very clear that the question as to the witness' right of appeal from the Judge's order is not presented. In regard to contempts, it is provided by The Code, chapter 14, section 648 (6), that the contumacious and unlawful refusal of any person to answer any legal and proper interrogatory shall subject him to punishment "for contempt" and not "as for contempt," and the proceeding by which the facts are ascertained and the particulars of the offense specified and spread upon the record and the punishment is imposed "may be summary" when the alleged contempt is committed "in the immediate view and presence of the Court." By The Code, section 654 (4), it is provided that any person summoned as a witness and refusing to attend or to be sworn or to answer as such witness may be attached and punished "as for contempt." The different phraseology of the two sections upon the same subject-matter raises an important and interesting question as to the right of appeal. It will be observed that section 650 provides that the Court "may" punish summarily when the contempt is committed in its immediate view and presence, not that it "shall" do so, and when it does decide, under the circumstances of the particular case, that summary punishment shall be imposed, it is required to find the facts and "specify them on its record," but the requirement does not of itself give the right

to have the judgment of the Court reviewed by appeal or *certiorari*. *State v. Mott,* 49 N. C., 449. We are not now privileged to express an opinion as to how far, if at all, the principle of that case should control in this. Whether, if there is any method of review, it is by appeal, *certiorari* or *habeas corpus* is not, it seems to me, before us for decision, and when the question is properly presented the solution of it will be attended with some difficulty, as the language of the two sections of The Code to which reference has been made is not altogether free from ambiguity. As the question of the right of appeal is not therefore free from doubt, and is one fit for careful and serious consideration, it is well not to anticipate a decision of it by the slightest intimation as to the answer that it should receive. It is not only important but it is expressly required by the statute that the Court should "specify" the facts and particulars of the offense on the record, and then the reviewing tribunal, if the decision of the Court is reviewable, may for itself decide whether a contempt has been committed.

In this connection, the language of the Court in *Ex-parte Summers,* 27 N. C., 149, may be pertinent. Since that decision was made, the law has been amended so as to require the facts to be stated on the record. The Court in that case said: "It befits every Court which has a proper tenderness for the rights of the citizen and a due respect to its own character to state facts explicitly, not suppressing those on which the person might be entitled to be discharged more than it would insert others which did not exist, for the sake of justifying the commitment. A court which knows its duty, and is not conscious of violating it, will ever be desirous of putting upon the record or in its process the truth of the case, especially as thereby a higher court may be able to enlarge a citizen illegally committed or fined. But if the commitment or fine be in a general form for a contempt all other

courts are bound by it, and the party can only free himself by purging the contempt before the Court that has adjudged it." And again, referring to the appeal which the respondent had taken in that case, the Court says: "But in truth this is not, we think, the proper method of contesting the propriety or lawfulness of this order, if there be any such method. From the very nature of contempts, and in order that the punishment may be efficacious, the punishment must be immediate and peremptory, and not subject to suspension by appeal at the mere will of the offender, nor by any proceeding in the nature of an appeal. Suppose one to come into Court and abuse the Judge on the bench? Or suppose a sheriff with a writ in his hand in the presence of the Court positively refuses to return it, so that the party's action will be discontinued? What would sentences for these contempts be worth if the culprit could supersede them by appeal, *certiorari* or writ of error? Manifestly nothing; and the authority of the Court would really be contemptible if it could be thus eluded and prostrated. There is no instance therefore of the re-examination of an order committing or fining a person for a contempt, with the view of hearing the evidence and trying the question *de novo*, nor directly to reverse or quash an order of commitment or imposing a fine for an intrinsic insufficiency. If there be such insufficiency upon the face of the order the party has his remedy by *habeas corpus* and by action against those who act on the order either against his person or property."

The same may be said of Summer's case as was said of *State v. Mott, supra.* Whether its principle should apply to a state of facts such as is disclosed in this record must be left, for the present at least, as an open question for the reasons we have already given.

In the present case the facts are not fully stated and it is not shown what was the manner or demeanor of the wit-

ness, and this omission was proper, for it sufficiently appears that nothing more was put upon the record because it was the purpose to present the single question as to the meaning of section 1215 of The Code. A similar question was before this Court for its consideration in *La Fontaine v. Underwriters,* 83 N. C., 132, in which the Court construed section 488 (5) of The Code, the provision of that section in regard to exemption from prosecution being much less broad and comprehensive in affording protection to the witness than is the provision of section 1215. It is as follows: "But his (the witness') answer shall not be used as evidence against him in any criminal proceeding or prosecution." This was held in that case to be a sufficient exemption from criminal liability, and exposed the witness to punishment for contempt if he refused to answer any proper and legal question upon the ground that it would tend to convict him of a criminal offense. There was a full discussion in that case of the question whether the answer of the witness, while not tending directly to criminate him, might not furnish a "clue" which would lead to the discovery of evidence against him or supply one link in the chain, so that it would, in connection with other facts, have that tendency, or whether it would not disclose some fact which, though not in itself any evidence of guilt or even a circumstance tending to show guilt, might disclose other facts and circumstances which would form a complete chain and lead to his conviction. The Court reached the conclusion, after a consideration of this view of the matter, that the testimony of the witness cannot be used, directly or indirectly, either in the pending proceeding or in any other prosecution, and that if any evidence attempted to be used in any such proceeding against the witness can be traced to a statement made by him while on the stand as the cause which led to its discovery, the witness will be protected and can plead or otherwise avail himself of

the fact in bar of the prosecution. We all agree, as I understand, that the first three questions did not tend to criminate the witness and he was bound to answer them. The ground taken by the respondent that those who participated in the game, and whose names he would disclose if he answered the questions, might in their turn give evidence against him, has been held to be untenable, the doctrine being grounded more on the fear of retaliation than on any sound principle of law. *Ward v. State,* 2 Mo., 120, 22 Am. Dec., 449; *La Fontaine v. Underwriters, supra.* The fourth question tended to criminate the witness but he was fully protected and "pardoned' by the statute, "and his constitutional right therefore to give evidence against himself was maintained intact." *La Fontaine v. Underwriters, supra.* The clause of the Constitution (Article 3, section 6) which confers power on the Governor to pardon persons convicted of criminal offenses does not seem to have been intended as an exclusive grant of such power, and the Legislature may exercise the right of pardon in the form in which it is authorized to do so by the statute under consideration. This Court has decided that the Legislature may grant amnesty (*State v. Blalock,* 61 N. C., 242), which has been defined to be "a sovereign act of pardon and forgetfulness for past acts of a criminal nature." Black's Law Dict., page 68. It is at least co-extensive in its meaning with the word "pardon," so far as its effect is concerned, because it effaces or wipes out the offense which has been committed, "the difference between the two being that a pardon is granted to one who is certainly guilty, sometimes before but usually after conviction, and the Court takes no notice of it unless pleaded or in some way claimed by the person pardoned; and it is usually granted by the Crown or by the Executive; but amnesty is extended to those who may be guilty and is usually granted by Parliament or the Legislature and to whole

classes before trial. Amnesty is an abolition or oblivion of the offense; pardon is its forgiveness." *State v. Blalock, supra.* In that case this Court virtually held that the Legislature can pardon an offense, and it certainly must have the power to do so when that power is exercised in furtherance of the prosecution of crimes and of the detection and punishment of criminals. As soon as the witness testifies in a case which brings him within the protection of the statute he is at once pardoned of his own offense, the same as if it had never been committed, and he is in no danger of being prejudiced by any self-crimination.

Even when the witness is not protected by the statute, the question which tends to criminate him is not for that reason incompetent. The right to refuse to answer any such question is a personal privilege of the witness, and if he voluntarily relinquishes the privilege and chooses to answer, no party to the suit can complain. *State v. Allen,* 107 N. C., 905; *Boyer v. Teague,* 106 N. C., 576, 19 Am. St. Rep., 547; *State v. Morgan,* 133 N. C., 743. It has also been ruled to be a question of law for the Judge to decide whether the testimony of the witness may criminate him. If in no possible view it can have that tendency the Court decides the question as one of law; but if it may subject him to prosecution, depending upon the answer he gives to the question, it has been said that the witness has the right to decide whether it will or not. For example: when the question calls simply for an affirmative or negative response the witness must be the judge, for he only knows what the answer will be, whether "yes" or "no," but it is manifestly the duty of the Court to inform him as to his rights and his privilege, and to instruct him as to how he may claim and exercise the same. When, however, he is fully informed by the Court that the law compels him to answer and that he has no privilege, or that the question which is asked has

no possible tendency to criminate him, he must answer it or his refusal to do so will be at his peril, for the plain reason that the Court must decide that question as one of law and the witness must submit to that decision. If he persists in his refusal to answer, he may be summarily punished for his contumacy. 29 Am. & Eng. Ency. (1 Ed.), page 43; Code, section 648. And right here the question will arise whether he has the right to a review of the proceedings by appeal. Whether he has or not, it would be the duty of the Court in such a case to state fully in the record "the particulars of the offense" and then pronounce its judgment, so that the witness may avail himself of any remedy open to him for a review of the Court's decision by appeal or otherwise if the decision can be reviewed, or so that a revising tribunal may determine whether the judgment is warranted by the facts so specified in the record. When we have before us a record thus made up, we will be called upon to decide what is the procedure in such a case, if there is any, for reviewing or revising the judgment of the Court. The contempt committed in the case at bar, as shown in the record, is more technical than actual, and it is not incumbent upon us to do more under the circumstances than affirm the judgment, which, by the way, is all that is asked to be done by the Attorney-General in his well-considered brief.

The other questions are so fully and ably discussed in the opinion of the Court, delivered by the *Chief Justice,* that it is not necessary for any reference to be made to them in this opinion.

CLEGG v. RAILROAD CO.

(Filed April 19, 1904).

CARRIERS—*Damages—Carriers of Goods.*

Where a carrier wrongfully refuses to deliver freight because the owner declines to pay an alleged overcharge in freight, such carrier cannot avoid payment of damages for injury to the freight by showing that the owner did not have the bill of lading at the time he demanded the goods.

WALKER and CONNOR, JJ., dissenting.

ACTION by Z. V. Clegg against the Southern Railway Company, heard by *Judge O. H. Allen* and a jury, at September Term, 1903, of the Superior Court of GUILFORD County. From a judgment for the plaintiff, the defendant appealed.

C. M. Stedman and *Brooks & Thompson,* for the plaintiff.
King & Kimball, for the defendant.

MONTGOMERY, J. The defendant company received at Greensboro, on Sunday afternoon, the 15th of November, 1901, a car-load of bananas from Baltimore consigned to the Greensboro National Bank, "To order. Notify Z. V. Clegg." Clegg was notified by the bank of the arrival of the goods, and on the 16th, 17th and 18th of November demanded of the freight agent of the defendant at Greensboro the delivery to him of the same. A dispute over the amount of the carriage due upon the shipment having arisen the fruit was not delivered, and before the plaintiff got possession of it it was greatly injured by a spell of freezing weather, by which a loss was inflicted on the plaintiff. The defendant deducted from the freight charges the excess as contended

for by the plaintiff, the same being erroneous. The amount demanded by defendant as dues for carriage was $148. The amount offered by the plaintiff was $106, which amount was afterwards found to be the amount due. The defendant introduced no evidence. The plaintiff had not received from the bank a transfer of the bill of lading at the several times when he made the demands for the delivery of the fruit and did not receive it until the 18th of the month. If the defendant had refused to deliver the goods because the plaintiff had not received from the bank the assignment or transfer of the bill of lading, or partly for that reason, the defendant's contention, to-wit, that the plaintiff had no right to make the demand for the goods until he presented the bill of lading would rest on a solid foundation. But it is clear, from the evidence of the plaintiff, that the defendant made no point over the bill of lading not having been presented by the plaintiff, but rested its refusal on the ground that the plaintiff refused to pay the carriage due. The plaintiff testified that nothing was said to him by the freight agent as to his right to receive the bananas, and that nothing was said about that matter until after they had corrected the freight charges, when he was told that he would have to get an order from the bank. The defendant having at the times of the several demands assigned no other reason for refusing to deliver the goods than the refusal of the plaintiff to pay an excessive charge for carriage, ought not to be allowed to defeat the plaintiff's right to recover the amount of his loss on the ground that he did not present the bill of lading or any other order from the bank, an objection not under consideration, and not thought of. *Railroad v. McGuire*, 79 Ala., 395. He was treated by the company as if he was the consignee; and in this connection it is significant that the plaintiff in his testimony said he had gotten the figures on the freight from the agent of the defendant in Greensboro before he bought

the fruit. So far as it appears from the evidence, the defendant would not have delivered the goods even if the plaintiff had presented the order from the bank. The defendant's purpose was to collect the bill for the freight, and not so much to see that the plaintiff paid the consignor for the bananas. It was contended for the defendant that the plaintiff should have paid the excess of carriage, received his goods and then sued the defendant for that excess. That was one of his remedies, but he was not compelled to take that course. He might not have had the money with which to pay the excess of carriage; but, if he had, the defendant by its wrongful course could not compel the plaintiff to pay a greater amount than was due. Such a demand would place the law-abiding at the mercy of its violators. The plaintiff recovered from the defendant the difference between the amount of sales of the injured fruit as made by the plaintiff and its value when it was received at Greensboro.

Affirmed.

WALKER, J., dissenting. My understanding of the facts and the law of this case differs so essentially from the views expressed in the opinion of the Court, that I am constrained to differ with the majority of the Judges, not only in their reasoning, but in their conclusion. In its opinion the Court says: "The plaintiff had not received from the bank a transfer of the bill of lading at the several times when he made the demands for the delivery of the fruit and did not receive it until the 18th of the month." The Court then proceeds to say that if the defendant had refused to deliver the fruit because the plaintiff had not received the assignment or transfer of the bill of lading from the bank, or partly for that reason, the defendant's contention that the plaintiff had no right to make the demand for the fruit until he presented the bill of lading would rest on a solid foundation. It seems

to me that the Court's deduction from the evidence that the defendant made no point about the bill of lading, but refused to deliver the goods solely upon the ground that the plaintiff would not pay the freight charges, is not a correct one. The plaintiff demanded the goods at the freight office at a time when he had no title to them and when consequently he had no shadow of right to make the demand. There is no evidence fit to be submitted to a jury that the plaintiff at the time he demanded the delivery of the goods, on Monday the 15th of November, 1902, had paid the draft or account held by the bank and to which the bill of lading was attached, and certainly no evidence that he had received the bill of lading or that the same had been assigned or endorsed to him (which I will presently show was necessary to vest him with the title) until Thursday the 18th of November. The evidence is all the other way; plaintiff was the only witness examined in regard to this matter, and he was not able to say how much money he had in the bank and did not venture to testify that he had enough to pay the draft. He telephoned the bank that he would accept the fruit, but there is no proof reasonably sufficient to show that the bank actually charged the amount of the draft or account accompanying the bill of lading, and which it held for collection, to his account, or that it agreed to do so, and to extend credit to him for the difference between the amount of the draft and the amount, if any, already to his credit in the bank. There is affirmative evidence that he never paid the draft and got the bill of lading until the 18th, the day the goods were delivered to him, after they had been damaged by the freeze, for on the bill and draft was this endorsement, "Paid, November 18, 1901." The plaintiff admits, as the Court states in its opinion, that he did not actually get the possession of the papers from the bank until the 18th. The fact therefore is established by the plaintiff's own evidence that

when he made the demand on the 15th and 16th of November he did not have the bill of lading to produce. How has the defendant waived the production of the same? Is the mere fact that the plaintiff and the defendant's freight agent had a parley about the amount of the freight charges, during which nothing was said about the bill of lading, to be construed as a waiver? Surely not. The agent had the right to presume that the plaintiff had the bill of lading ready for delivery to him whenever they adjusted the difference in regard to the freight charges. He did not have the right to make the demand unless he had the bill of lading and was the rightful owner of the property, and was the agent therefore to suppose that he did not have the bill? The plaintiff knew whether he had the bill or not and, if he chose to make a demand when he did not own the property, and had not provided himself with the bill of lading duly endorsed or assigned, it was his own folly and his own fault, and is the defendant to suffer because its agent reasonably relied upon the plaintiff's implied representation that he had the right to make the demand? This would be a complete reversal of all legal presumption. The agent had the right up to the very last moment before he actually delivered the goods, or before they passed out of his possession or control, to demand the bill of lading. Even if there can be any such a thing as a waiver, upon the facts of this case was not the plaintiff clearly negligent in not informing the agent as to the true situation? He knew that he did not have the papers and had not paid the draft; the agent did not know this fact, and he had the right to think that no person would demand the goods who did not have the right to do so, and in this state of the case it was his right and his duty to hold the goods for the true owner, and to demand the bill of lading when he acquired knowledge of the facts.

But how can a waiver, in a case like this one, confer title

upon him who had no title? The doctrine of waiver is based upon the idea of estoppel. The general rule is that there can be no binding waiver of a right when there is no estoppel and no valuable consideration received. 28 Am. & Eng. Ency. (1 Ed.), 531; *Wool v. Edenton,* 117 N. C., 6. "To make out a case of abandonment or waiver of a legal right, there must be a clear, unequivocal and decisive act of the party amounting to an estoppel on his part." *Ross v. Swan,* 7 Lea (Tenn.), 467; *Diebl v. Ins. Co.,* 58 Pa. St., 452, 98 Am. Dec., 302. How can the plaintiff rely upon an estoppel when all the facts were known to him and none of them to the agent, and when the duty rested upon him to disclose those facts? Does any one suppose that the defendant's agent would have even discussed the question of freight charges with the plaintiff if he had known that plaintiff had not paid the draft and did not have the bill of lading? Waiver cannot be predicated of the agent's conduct towards the plaintiff, who at the time had no right, so as by its mere operation to give the latter a title which he did not previously have. Such a thing would be an anomaly in the law. Who was entitled to the goods on the morning of the 18th before the plaintiff got the bill of lading? The bank of course. If the bank had demanded the goods of the defendant could the latter have refused delivery? It could not, we must admit, and yet, if by the waiver the title passed to the plaintiff it would follow that he was entitled to the property, and the bank could not recover that which was its own and the title to which it had not in the least parted with. Can it be replied that the defendant would be compelled to deliver to the bank and be liable to the plaintiff for a conversion of the goods? Could there be such a double liability, and this, too, when the defendant acted upon the natural and legal presumption that the plaintiff had the bill of lading when he first made his demand, as he ought to have

had it, and when the plaintiff knew at the time that he did not have it and consequently that he was not entitled to demand the delivery of the goods? How can there be any element of an estoppel when the party relying on the estoppel has knowledge of a material fact which he does not communicate to the other party and of which the latter is ignorant?

Mere silence on the part of the defendant's agent did not amount to a waiver, because a waiver is to be implied from a party's silence when he is under no obligation to say anything. *Railroad v. Rust*, 19 Fed. Rep., 245. What obligation did the defendant owe to the plaintiff to demand the bill of lading? He had absolutely no title and no right to the goods, and beside, if the demand had been made, the plaintiff did not have the ability to comply with it, and this is certainly necessary to be shown in order to constitute in his favor a valid waiver. Why do a vain thing? The plaintiff must have shown that all the time from his first demand for the goods he had the bill of lading ready to be delivered to the defendant upon its request for it. It seems to be an incongruity in the use of legal terms to say that a person can waive a right which he has, so that it can be availed of by a person who at the time has no right at all, when there is no fraud.

There is another objection to the claim of waiver set up by the plaintiff. The facts now alleged as constituting a waiver were not pleaded (*Mfg. Co. v. Ins. Co.*, 110 N. C., 176, 28 Am. St. Rep., 673, 20 A. & E. Ency., 536) nor submitted to the jury, but the case was tried upon the theory alone that the plaintiff had actually paid the draft and received the bill of lading from the bank before the 18th. If there was no evidence to support this theory the plaintiff must fail in the suit, especially as the defendant moved to nonsuit. Where a party alleges performance of a condition precedent to the exercise of his right, evidence of waiver of the condition is

not admissible in support of such averment, because the two are inconsistent. He must amend his pleading or in some proper way put himself in a position to rely upon the waiver. *Manufacturing Co. v. Ins. Co., supra; Baldwin v. Munn,* 2 Wend., 399. "Waiver is usually a question of intent, and knowledge of the right and an intent to waive it must be made to appear plainly, and this is to be determined usually from the declaration and conduct of the parties." 28 Am. & Eng. Ency. (1 Ed.), 528. It is a mixed question of law and fact, each case necessarily depending much upon its own peculiar circumstances and surroundings. It is a question of intention and a fact to be determined by the triers of fact. *O'Key v. Ins. Co.,* 29 Mo. App., 111.

Passing to the question as to the legal duty of a carrier with respect to the delivery of goods, we find it to be well settled that an obligation to deliver to the party having title under the bill of lading is imposed by law on the carrier and is absolute and imperative, and a delivery to any other person is a conversion. *Railroad v. Barkhouse,* 100 Ala., 543. The duty of a common carrier is not only to carry safely, but to make a true delivery to the person to whom the goods are consigned (*Houston v. Adams* (Tex.), 30 Am. Rep., 119), and a delivery to any other is made at the peril of the carrier, unless that person surrenders the bill of lading either made or endorsed to himself. *Gates v. Railroad,* 42 Neb., 379; *Weyand v. Railway Co.,* 75 Iowa, 573, 1 L. R. A., 650, 9 Am. St. Rep., 504; *M. T. D. Co. v. Merriam,* 111 Ind., 5; *Bank v. Railway Co.,* 160 Ill., 401. One reason for this rule is that the bill of lading is the symbol of ownership of the property, and though not negotiable, in the ordinary sense, is assignable. *Gates v. Railroad, supra.* The carrier can require the production or an inspection of the bill of lading at any time before delivery. Porter on Bills of Lading, section 379. The same right belongs to his agent for his own

security and protection, and he may exact production of the bill before he gives up the property. Until the carrier can deliver to the shipper, or some one showing authority from him (the bill of lading duly endorsed and delivered being evidence of that authority), it is his duty to retain the goods, and if they are delivered to one not legally entitled the carrier will be liable to the true owner for their value. He has no right under any circumstances to deliver them to a stranger. *The Thames,* 14 Wall., 98. The carrier is bound not to deliver to any one who has not the bill or symbol of ownership. Portner B. of L., section 414. The pledgee of the bill of lading is not divested of his right or title by any delivery to the consignee, though that delivery was obtained upon presentation by the latter of a duplicate bill or invoice, which the carrier treats as sufficient authority in him to receive the goods. Section 530. "The carrier takes the risk of a delivery to the person entitled to the goods by the bill of lading and its endorsement. * * * Too great caution cannot therefore be exercised in respect to the right of the person to whom the delivery is made. No obligation of the carrier is more rigorously enforced than that which requires delivery to the proper person, and the law will allow in fact of no excuse for a wrong delivery except the fault of the shipper himself." Hutchison on Carriers (2 Ed.), sections 130, 340 and 344 *et seq.*

It was therefore the duty of the defendant to hold the goods until the rightful owner or the holder of the bill of lading had made demand upon it for them, and the failure to do so subjects it to liability to such owner or holder for any loss or damage sustained by reason of its default. *Bass v. Glover,* 63 Ga., 745; *Bank v. Colgate,* 4 Daly, 41; *Bank v. Stewart,* 19 N. B. (P. & B.), 268; *Bank v. Hazeltine,* 78 N. Y., 104, 34 Am. Rep., 518; *Dwyer v. Ry. Co.*, 69 Tex., 707; *Express Co. v. Dickson,* 94 U. S., 549. If this be law,

and it unquestionably is the law, the effect of the decision in this case will be to hold that a carrier will be liable to one in damages if the latter makes a demand for the delivery to him of goods in the carrier's cars or warehouse, when the party making the demand has no claim or title to the goods, and no right therefore to make it, provided the amount of freight charges is tendered and the carrier refuses to deliver the goods, but does not at the time call for the production of the bill of lading properly endorsed to the consignee. In my opinion this is an innovation in the law of carriers, and contravenes the well-settled rule that one who acquires title to property after it has been damaged does not acquire also the cause of action for the damage, unless it is expressly assigned to him. *Drake v. Howell,* 133 N. C., 162; *Liverman v. Railroad Co.,* 114 N. C., 692.

The defendant is liable to the bank, if to anybody, for any damage to the goods while in the care of the defendant, up to Thursday the 18th. The right to recover upon this liability has never been transferred to the plaintiff, nor did it become his, as we have seen, by virtue of his subsequently acquired ownership of the goods. As said by the Court in *Young v. Railway Co.,* 80 Ala., 100, a case very much in point, "the defendant's duty not to deal tortiously with the property of an innocent third person (a bank holding a draft with a bill of lading attached) cannot be affected by the failure of the depot agent first to tender back to the plaintiff (assignee or consignee) the amount of freight collected on the goods. The law will not compel the defendant carrier to commit a tort by delivering goods to the plaintiff because the agent agreed to do so in consideration of the payment of freight," unless he is the holder of the bill of lading. No one shall be rebuked by the law for doing that which he is enjoined by the law to do, much less will he be made to suffer for his correct conduct. The defendant agent

had the right to rely and act upon the principle, knowledge of which the plaintiff should have had, that according to the usual and ordinary course of business recognized by the law, the goods could not be obtained by him except upon the production of the bill of lading, and his conduct therefore was not in law or in fact calculated to mislead the plaintiff and thus to create an estoppel upon the company, from which a waiver of the right to call for the bill of lading would be presumed or even inferred. *Forbes v. Railroad,* 133 Mass., 157.

The motion to nonsuit, in my opinion, should have been granted, as the plaintiff showed no just or legal claim to the damages he seeks to recover, and there should at least be a new trial, in any view of the case, as the Court charged the jury upon a theory which was not supported by any proof, and the question of waiver upon which the case is now decided, if there is any evidence of it, was not submitted to the jury.

As the plaintiff is allowed to recover upon a cause of action which I do not think he owns, the defendant is practically in danger of being twice vexed for one and the same cause, or of being compelled to assume a double liability, which surely would be unjust, and the rule of law which produces such a result should be very clearly established. Indeed, if the law is to remain as in this case declared, it will be difficult for common carriers to conduct their business with any degree of safety. If the defendant is liable for any negligence to the bank, which at the time of the injury to the bananas was the true owner, as the holder of the draft and bill of lading, let the recovery be confined to the true right and title and not go to one who has no right at all.

CONNOR, J., concurs in the dissenting opinion.

BROOKS v. TRIPP.

(Filed April 26, 1904)

FISH AND FISHERIES—*Taxation—Constitutional Law—Customs—Acts 1903, ch. 414.*

An act levying a tax upon all clams and oysters shipped out of a county is constitutional.

DOUGLAS, J., dissenting.

ACTION by J. W. Brooks and others against L. C. Tripp and others, heard by *Judge G. S. Ferguson*, at March Term, 1904, of the Superior Court of BRUNSWICK County. From a judgment for the defendants, the plaintiffs appealed.

Russell & Gore, for the plaintiffs.
Cranmer & Davis, for the defendants.

CLARK, C. J. This is an action to restrain the execution of chapter 414, Laws 1903, its unconstitutionality being averred on the ground that it lays a tax of three cents per bushel on clams, two cents per bushel on oysters in the shell and two cents per gallon on shucked oysters "shipped out of said county," and not also upon the shell-fish situate, dug or consumed within said county, and that the said tax amounts to an impost or export tax and is not levied for the purpose of inspection.

The act in question is entitled "An act to protect and promote the shell-fish industry of Brunswick." If such is its true purport and object, it is within the police power of the State, and a tax levied for such object would be legal although laid only upon shell-fish in that county. If levied upon shell-fish in that county only for the purpose of raising revenue for the State treasury, it would be forbidden

by the Constitution because not laid by "uniform rule." *State v. Moore,* 113 N. C., 697, 22 L. R. A., 472. But the presumption is that a statute is constitutional unless the contrary clearly appears. *Sutton v. Phillips,* 116 N. C., 502. An examination of the statute shows that for the purpose of enforcing the laws and regulations to protect shell-fish, and especially the prohibition of disturbing their beds during the prescribed "close season," the Governor is authorized to appoint a shell-fish commissioner at a salary of $400 per annum, and such commissioner is empowered to appoint "two or more sub shell-fish commissioners to aid him in his work, who shall receive $25 each per month while so employed, and that the fund raised by the above tax is to be paid to the county treasurer, and the surplus (if any) shall be paid by him into the State treasury after "first deducting" the salaries of the aforesaid officers. It is further provided that such officers shall receive no compensation whatever except out of said funds. From the title and general purport of the act, and especially the provision for the appointment of an unlimited number of deputies, it is clear that there was no expectation or intention to raise any money for the State treasury (and none has been paid into the State treasury from this source), but that the object was solely to provide salaries for those engaged in enforcing the regulations for the protection of shell-fish in Brunswick County. It must clearly appear that the object was not that recited, but was in fact to raise revenue for the State before the act can be declared unconstitutional. The statute may be unguarded in not restricting the number of sub shell-fish commissioners, but the Legislature may have thought this was sufficiently done by providing that the officers should receive no compensation except from this fund. If there is a defect in this regard, making the act liable to abuse,

this is a matter for legislative correction, but it does not render the statute unconstitutional.

The tax required for the enforcement of a police regulation is not a tax within the meaning of our Constitution requiring uniformity and equality in taxation, but "is a proper mode of providing for the compensation" of an officer designated to enforce such regulation in the prescribed territory "and the payment of any expenses incidental to this" duty. *State v. Tyson,* 111 N. C., 687. Local legislation in the nature of police regulation has always been sustained—see as to the sale of liquor, sale of seed cotton, fence laws, cattle running at large, working public roads and such legislation for many other purposes, the authorities collected in *State v. Sharp,* 125 N. C., 632, 74 Am. St. Rep., 663.

In fact, this statute applies uniformly to all citizens of Brunswick and all others, whether residents or nonresidents of this State, who go to that county to take shell-fish for shipment. But even if the act had forbidden nonresidents of this State to take shell-fish in that county, it would have been competent for the Legislature to so enact, for the ownership of game and fish is in the State, and license to hunt or fish is not an immunity or privilege of the citizens of this State. *State v. Gallop,* 126 N. C., 983, and cases cited; *McCready v. Virginia,* 94 U. S., 391. In *Chambers v. Church,* 14 R. I., 398, 51 Am. Rep., 410, it is held that a State "may forbid nonresidents from catching fish in its waters for manure and oil, and manufacturing manure and oil from fish caught in its waters." In *Harvey v. Compton,* 36 N. J. Law, 507, in the matter of prohibiting nonresidents from gathering oysters within the waters of New Jersey, the Court says: "Such enactment for the protection of property must be considered as a matter of internal police, and not a regulation of commerce with foreign nations or among the States. Neither does it controvert the provisions of the

United States Constitution that the citizens of each State shall be entitled to all the privileges of citizens of the several States." But this statute, in fact, makes no discrimination in favor of the citizens of North Carolina.

It is further and chiefly contended that the act is unconstitutional in that it levies the tax solely upon shell-fish shipped out of the county and not also upon the other shell-fish situate, dug or consumed in said county. The tax could not be levied upon all the shell-fish "situate" in Brunswick County, because there is no possible means to ascertain this. It would also be difficult to ascertain the number dug and consumed. The ascertainment of the number shipped out of the county is more practical, and the levy of a tax thereon is a reasonable method of deriving funds for the enforcement of the regulations for the protection of shell-fish, and is not for revenue. It is not unreasonable that no tax is laid upon shell-fish consumed for the sustenance and support of the people residing in the county. The tax laid is not an export tax, but is simply the method chosen by the Legislature as the least onerous and most practicable system of raising the necessary funds to defray the expenses of protecting the shell-fish industry in the county of Brunswick. The regulation of fishing and hunting is, as above said, a matter entirely within the discretion of the State. *Lawton v. Steele*, 151 U. S., 133; *State v. Gallop*, 126 N. C., 984.

In refusing to hold the statute unconstitutional there was No Error.

DOUGLAS, J., dissenting. The opinion of the Court rightly says: "If (the tax were) levied upon shell-fish in that county for the purpose of raising revenue for the State treasury, it would be forbidden by the Constitution because not laid by uniform rule." The opinion further says, and I think correctly so, that "from the title and general purport of the

act, and especially of the provision for the appointment of an unlimited number of deputies, it is clear that there was no expectation or intention to raise any money for the State treasury (and none has been paid into the State treasury from this source), but that the object was solely to provide salaries for those engaged in enforcing the regulations for the protection of shell-fish in Brunswick County." The act provides that "the tax so collected is to be paid to the County Treasurer of Brunswick County and *by him paid to the State Treasurer,* after first paying the shell-fish commissioner a salary of $400 per annum, and sub shell-fish commissioners, etc." The act further provides that "The shell-fish commissioner shall be one of the *qualified voters* of Brunswick County," and that he in turn "shall have the power to appoint two or *more* sub shell-fish commissioners out of the *qualified voters* of Brunswick County." No other qualifications appear to be required, and while their general duties "shall be to protect and promote the shell-fish interests of Brunswick County," their special duties seem to be to collect sufficient tax to pay their salaries. It seems to be conceded that if the tax were a source of revenue to the State the act would be unconstitutional. I gravely doubt whether the constitutionality of an act of the Legislature should ever be made to depend upon the absorptive powers of any set of officers. However, it is due to them to say that so far they seem to have effectually maintained its constitutionality under the test indicated in the opinion of the Court. I cannot bring my mind to assent to the validity of such legislation, which, in my opinion, substitutes the will of the draughtsman for that of the General Assembly. It is due to the Legislature to say that the act was passed in the closing days of its session.

HELMS v. HELMS.

(Filed April 26, 1904).

1. ISSUES—*Trial.*

The refusal to submit issues, the answers to which would not affect the result, is not error.

2. REFORMATION OF INSTRUMENTS—*Evidence—Deeds—Mistake.*

The evidence of a statement by a grantor to a grantee at the time of the delivery of a deed that it should be void if the grantee did not support the grantor, is not sufficient evidence to show that this condition was omitted from the deed by mistake.

3. DEEDS—*Covenants—Consideration—Subrogation.*

Where the grantee in deed agrees, as a part of the consideration, to support the grantor, which he fails to do, and the grantor executes another deed to a third person, the second grantee is not subrogated to the rights of the grantor to enforce her claim for support.

4. ESTOPPEL—*Deeds—Declarations.*

A declaration, by a grantee in a deed duly recorded, to the effect that he does not claim any interest in the land conveyed, does not operate as an estoppel *in pais* in favor of a subsequent grantee from the same grantor, having actual notice of the prior deed.

CLARK, C. J., dissenting.

ACTIONS by W. L. Helms against Henry Helms and others, heard by *Judge H. R. Bryan* and a jury, at February Term, 1904, of the Superior Court of UNION County. From a judgment for the plaintiff the defendants appealed.

Redwine & Stack, for the plaintiff.
Adams, Jerome & Armfield, for the defendants.

CONNOR, J. Elmira Helms, being the owner of an undivided one-sixth interest in the *locus in quo,* executed a deed

on August 14, 1897, to William L. Helms, conveying such interest to him in consideration of "One dollar to her paid by William L. Helms, the receipt of which is hereby acknowledged, and the further consideration of the support during the natural life of the party of the first part." Following the covenant of warranty are these words: "And it is further understood and agreed between the parties that the above lands shall stand good for the support and maintenance of the said Elmira Helms during her natural life." This deed was recorded August 14, 1897.

On August 17, 1898, the said Elmira conveyed her one-sixth interest in a part of the land to Gabriel W. Helms. This interest was afterwards conveyed to defendant Haney Helms. Elmira died February 3, 1903. W. L. Helms on April 7, 1903, brought this special proceeding, making the other tenants in common parties defendants, for the partition of the land, claiming one-sixth interest therein by virtue of said deed from Elmira. The defendant Haney Helms filed a separate answer denying that the said William L. owned any interest in the land, for that in the execution of the deed it was understood and agreed that the consideration thereof was the future support and maintenance of the said Elmira by him, and that he undertook and agreed that he would support her during her natural life, and if he failed to do so said deed would be void. He also says that such condition should have been inserted in the deed, but was omitted by "inadvertence or otherwise" of the draughtsman. That he never supported the said Elmira and disclaimed having any interest in said land. He sets up the deed from Elmira to Gabriel, and the heirs of Gabriel to himself, for her undivided interest in the land. He further says that the real owners of said land have made partition thereof and are in possession of their respective shares. He asks that the deed from Elmira to the plaintiff

be cancelled, etc. By an amended answer the defendant Haney says that the plaintiff failed and refused to support the said Elmira, and that in her last sickness she required attention, etc., amounting in value to $10 per month, and that by reason thereof the land became subject to a charge of several hundred dollars. That by the deed of Elmira to Gabriel Helms, and from the heirs of Gabriel to him, he is subrogated to the rights of Elmira, "in and to the charge on the land for the support, etc., of said Elmira," and he hereby pleads the same as an estoppel or bar to any claim for the said land by the said W. L. Helms." The plaintiff filed a reply to the new matter set up in the answer denying same. The cause was transferred to the civil issue docket for trial. The plaintiff tendered the following issue: "Is the plaintiff the owner and entitled to be let into possession of the one-sixth interest in the land described in the complaint?"

The defendant tendered several issues directed to the inquiry whether there was an agreement between Elmira and W. L. Helms that the deed should be void if W. L. Helms failed to support said Elmira, and whether such agreement was omitted by the mutual mistake or ignorance of the parties or of the draughtsman, also whether W. L. Helms supported said Elmira, and the value of such support. His Honor declined to submit the issues tendered by the defendant and adopted that tendered by the plaintiff. Defendant excepted. In respect to the first two issues tendered by the defendant, it is sufficient to say that if found in the affirmative such finding could not have affected the result or judgment. It would have amounted simply to a finding that the parties made an agreement and that they failed to insert it in the deed. The proposition is stated by the defendant when he placed M. L. Flow upon the stand and proposed to prove by him that he "drew the deed, and

that Elmira stated to W. L. Helms at the time, and before delivering the deed, that the deed should be void if W. L. Helms failed to provide for and take care of Elmira." There is no suggestion in the evidence offered that there was any agreement or understanding that the provision should be put in the deed, or that the draughtsman was instructed to do so. *Green v. Sherrod,* 105 N. C., 197, is exactly in point, as is also *Morris v. McLam,* 104 N. C., 159, and *Frazier v. Frazier,* 129 N. C., 30. If the deed had contained the words suggested, they would have constituted a condition subsequent. Could advantage have been taken of its breach by any one except the grantor, and is there any allegation that she did so? The exception to his Honor's refusal to submit these issues cannot be sustained. The other issues tendered were immaterial. The only questions upon which the decision of the cause depended is whether the words *"and for the further consideration of the support during the natural life of the party of the first part by the party of the second part"* create a condition subsequent, and if so, whether in the light of the pleadings the said Elmira availed herself of the breach, or whether her deed vested in the defendant the power to enter for condition broken. The defendant Haney Helms was introduced by the plaintiff. The defendant upon cross-examination proposed to show by him that the plaintiff never supported, cared for or maintained Elmira in any way whatever, or contributed thereto, after the execution of the deed. That he admitted he did not claim any interest in the land in controversy. That such admissions were made before and after the death of Elmira. That in consequence of such statements he took the deed from the heirs of Gabriel Helms. That W. E. Williams and wife supported Elmira; that the plaintiff never took exclusive possession of said land, but simply went on the same to live with Elmira a short time

after execution of the deed and remained there only six months, and abandoned all claim to the land, etc. To all of this evidence the plaintiff objected, and upon the objection being sustained the defendant excepted. Defendant moved to dismiss the proceeding under the Hinsdale Act, and to his Honor's refusal to allow the motion excepted. Defendant introduced M. L. Flow and proposed to ask him the questions hereinbefore set out, also as to conversation with plaintiff in regard to the land before and since the death of Elmira. All of this proposed evidence was, upon objection, excluded, and defendant excepted. The defendant offered to show by the tax list that plaintiff had not listed the land for taxes. This was excluded. Defendant renewed his motion to dismiss, and to his Honor's refusal excepted. The Court instructed the jury that if they believed the evidence, which was documentary, to answer the issue Yes, and to this the defendant excepted. The defendant assigns a large number of errors; they all involve the same question and must be disposed of upon the same principle. Does the language of the deed operate as a condition subsequent, the breach of which entitles the grantor to avoid the deed and divests the title out of plaintiff, or does it operate as a covenant to furnish support, a breach of which constitutes a charge upon the land? The rule of construction is thus stated: "Conditions subsequent are not favored in the law, and are construed strictly because they tend to destroy estates." Kent's Com. (13 Ed.), star page, 130. "If it be doubtful whether a clause in a deed be a covenant or a condition, the courts will incline against the latter construction; for a covenant is far preferable to the tenant." *Ibid.*, 132.

"A conveyance in consideration of support to be furnished the grantor or another person does not create a condition unless apt words of condition are used, and even then it will

not be held to create a condition unless it is apparent from the whole instrument that a strict condition was intended." Law of Conveyances (Jones), section 646, page 534.

In *Laxton v. Tilly,* 66 N. C., 327, the deed recited that it was made "for and in consideration of $200 and the faithful maintenance of T. L. and wife P. L." *Held,* that the maintenance was a charge upon the land.

In *McNeely v. McNeely,* 82 N. C., 183, the land was devised "To my son Billy at the death of his mother, by him seeing to her." It was held that the words "by him seeing to her" did not operate as a condition to terminate or impair his estate." *Smith, C. J.,* says: "The words are in themselves vague and indefinite, and if an essential and defeating condition of the gift, would be very difficult of application. What is meant by a 'seeing to' the widow, and what neglects fall short of that duty? * * * And how is the dividing line to be run between such omissions as are and such as are not fatal to the devise? * * * Titles would be rendered very precarious and uncertain if such matters *in pais* were allowed to defeat a vested estate."

In *Gray v. West,* 93 N. C., 442, 53 Am. Rep., 462, the language was: "That A. G. should have support out of the land." *Held,* that the support was a charge on the rents and profits. In *Misenheimer v. Sifford,* 94 N. C., 592, the devise was to A., "provided he maintain his mother during life comfortably, and shall give her houseroom and firewood during her life or widowhood." *Held* a charge on the rents and profits, and not a condition. In *Outland v. Outland,* 118 N. C., 138, the language was construed a charge on the land. *Wall v. Wall,* 126 N. C., 405.

The language in *Tilley v. King,* 109 N. C., 461, was "And if P. H. T. stays with us until after our deaths, *then* I give this land to him." This was held, *Shepherd, J.,* delivering the opinion, a condition precedent. He says: "The words

used by the testator are words of strict condition." The learned Justice distinguishes the case from those "where a devising clause is followed by or coupled with a proviso that the devisee shall pay to another a specific sum or to support or maintain a certain person," citing *Misenheimer v. Sifford, supra. Erwin v. Erwin,* 115 N. C., 366, which appears to hold otherwise, is overruled in *Allen v. Allen,* 121 N. C., 328, *Montgomery, J.,* saying: "That being in doubt we are disposed to adopt the first view, because the law favors the vesting of estates and leans to the view of a charge rather than a condition precedent."

Looking to other jurisdictions we find the same trend of thought. In *Lindsey v. Lindsey,* 62 Ga., 456, *Jackson, J.,* says: "The consideration of the deed is the continued support of the father by his son, to whom it is made. This is not a condition precedent." In *McCardle v. Kennedy,* 92 Ga., 198, 44 Am. St. Rep., 85, it is said: "The failure to pay the purchase-money, or the failure to maintain and support the grantor, if that be the consideration, is not a sufficient reason for rescinding the contract of sale." In *Pownal v. Taylor,* 10 Leigh, 172 (34 Am. Dec., 725), *Tucker, P.,* says: "There is nothing I think in the proposition that the provision for support and maintenance constituted a condition for the breach of which the grantor might re-enter. It was a charge, not a condition. It was a declaration of a beneficial interest or a trust which might be enforced in equity, but which was perfectly consistent with the existence of the fee in the grantee." Speaking of the right of the grantor to re-enter, he says: "This cannot be unless the grantor had expressly reserved the right to re-enter upon failure of the grantee to fulfill the purposes of the grant." A deed was made "in consideration of natural love and affection," as well as "for the better maintenance and support" of the grantor. It was held that the maintenance,

etc., was the consideration and not a condition subsequent, etc. *Riley v. McNiece,* 71 Ind., 434.

The same view is expressed by the Supreme Court of Illinois, the Judge saying: "There is nothing in the form of the language here employed to indicate that it was intended that the conveyance was upon a condition. The words 'upon condition' do not appear. There is no clause providing that the grantor shall re-enter in any event, and these are the usual indications of an intent to create a condition subsequent." *Gallam v. Herbert,* 117 Ill., 160.

In *Ayer v. Emery,* 14 Allen (96 Mass.), 67, the same principle is announced, *Bigelow, C. J.,* saying: "But it is perfectly well settled that an estate on condition cannot be created by deed. Except when the terms of the grant will admit of no other reasonable interpretation." See also *Stoddard v. Wells,* 120 Mo., 25. While several of the cases cited arose upon the construction of wills, we find no distinction made and no reason for making any between wills and deeds. The difficulties which readily occur in treating provisions of this kind as conditions are numerous. The uncertainty into which titles would be thrown is a strong reason for construing provisions for support as covenants and not conditions is recognized by the courts. To treat them as mere personal covenants, having no security for their performance save the personal liability of the grantor, would often lead to injustice, leaving persons who had made provision for support in old age or sickness without adequate protection or relief. The courts have almost uniformly treated the claim for support and maintenance as a charge upon the land, which will follow it into the hands of purchasers. In this way the substantial rights of both grantor and grantee are preserved. "The grantee by accepting the deed and entering into possession under it becomes bound by the agreement providing for the support of the grantor, and

the provision for support thus becomes equivalent to a life annuity." Devlin on Deeds, section 807. It is also said that courts of equity will freely rescind conveyances by parents to sons upon breach of the agreement to support. *Buffalow v. Buffalow,* 22 N. C., 241. Jones on Conveyances, 646. The last clause in the deed from Elmira to plaintiff we think shows that the parties understood that her support was to constitute a charge on the land. It was in this way that the land was to "stand good for the support and maintenance" of said Elmira during her natural life. We therefore conclude that she was during her life entitled to charge upon the land her support. It may be that in the light of the conduct of the plaintiff a court of equity would have declared him a trustee and directed reconveyance of the land, but she sought neither remedy. *Buffalow v. Buffalow, supra.* The legal title was in the plaintiff, and could not be divested by a subsequent conveyance to some other person. "The grantor cannot rescind a deed in consideration of support for his life by exacting a subsequent conveyance without the consent of the grantee for the reason that the support has been withheld. He must resort to his action either for the value of the support withheld or to rescind on equitable grounds." Devlin on Deeds, 975; *McCardle v. Kennedy,* 92 Ga., 198.

To the suggestion that the defendant was subrogated to the right of Elmira to enforce any claim that she had for her support, it may be said that such claim originated after the execution of the deed to his grantors. If the defendant had actually paid out money for her support, which it was the duty of the plaintiff to have furnished, it may be that equity would have subrogated him to such claim, to be enforced as a charge upon the land in some appropriate proceeding. This question is not presented, because there is no allegation that the plaintiff supported her. Whatever

rights Williams may have had in this respect did not pass to the plaintiff by his conveyance. The declaration of the plaintiff as to his interest in the land could not operate as an estoppel *in pais*. It was proposed to show that he simply said that he did not claim any interest in the land; his deed was on record and the defendant had notice of it. It would seem that he had actual notice. He took the risk of buying with the facts before him. There is nothing in the conduct of the plaintiff commending his claim to the favor of the Court. His conduct is another illustration of the necessity for carefully safeguarding the rights of persons who convey their land to secure a support in their last days. In the reported cases of this and other States, as well as the experience of most lawyers, is found painful proof of the danger of weak and unusually ignorant persons making such dispositions of their property. Courts of equity will relieve them upon slight evidence of fraud, and courts of law will protect them as best they can by charging the support on the land. It would, however, render titles uncertain and precarious to construe into a condition that which is a matter of consideration or at most a covenant. We have carefully examined the numerous exceptions of the defendant and find no error in his Honor's rulings.

No Error.

CLARK, C. J., dissenting. Elmira Helms being desirous of obtaining a support in her old age in exchange for her land, conveyed it to William Helms "in consideration of one dollar and the further consideration of the support during the natural life of the party of the first part," and then in her poor way she added "and it is further understood and agreed between the parties that the above lands *shall stand good* for the support and maintenance of the said Elmira Helms during her natural life." She was not a learned and

technical lawyer. Had she been, the instrument would have been worded differently, but it is impossible not to see that these parties "understood and agreed" upon something different from an absolute and untrammeled conveyance, and that in fact, the consideration being for the grantor's support, the grantee was not to have the land absolutely unless and until such consideration was fully paid. It was agreed that the *"lands shall stand good* for the support and maintenance of said Elmira Helms *during her natural life."* The parties understood this and expressed it intelligibly, though not in words of technical art. The plaintiff being out of possession cannot recover, certainly not in a court combining equity with law, without showing a compliance with his contract. *Drisbach v. Serfass* (Pa.), 3 L. R. A., 836; *Williams v. Bentley*, 27 Pa., 294. In fact, the Court would adjudge upon the evidence that by the abandonment of the performance of his part of the contract by the plaintiff the instrument became null and void. *Hawkins v. Pepper*, 117 N. C., 407. Upon the face of the agreement, if there was no support whatever, there was to be no conveyance in exchange. The contract was in the nature of a conveyance, reserving the vendor's lien till the purchase-money was paid, whereupon only the title should become absolute. Till then it "stood good" was retained to secure such payment. In many States the vendor's lien exists till the purchase-money is paid, though there be no reservation in the deed, and such was formerly the law in this State. *Wynne v. Alston*, 16 N. C., 163, later overruled by *Womble v. Battle*, 38 N. C., 182, upon the sole ground that our registration law was intended to destroy all secret liens or reservations not upon the face of the deed. The reasoning does not apply here, where the condition is expressed, nor to the grantee in the instrument, for, as to him, the agreement is binding with or without registration. There is no reason the parties

cannot, and in such cases as this there is every reason why they should, retain title till the consideration is paid. Such provision showing the manifest intent of the parties should be construed according to the actual understanding and agreement of the parties and upheld in this court of equity, however it might have been in a court of law. It is not technical language that we should seek, but to effectuate the true agreement and understanding of the parties.

In fact, the grantee never took possession of the land at all, nor listed it at any time for taxation, nor paid any part of the consideration; he admitted such facts both before and since Elmira's death, and, in consequence of such default and abandonment of the contract, Elmira executed another deed to Gabriel Helms, under whom the defendant Haney Helms claims, to secure her support, which she thus obtained. The defendants offered this evidence, and in view of the contract that the "lands *shall stand good* for the support of Elmira Helms during her natural life," the evidence should have been admitted. It matters little whether these words constituted an inartificially expressed mortgage, or a retention of the vendor's lien, or a defeasance upon failure of consideration. The important consideration is to effectuate the true and manifest agreement of the parties, which requires that the plaintiff, who has paid nothing whatever for the land, shall not recover it in spite of his agreement that the land "shall stand good" for the purchase-money, against those who paid the stipulated consideration after the plaintiff had abandoned and wholly failed to execute the contract. The evidence offered and excluded went to show that proper technical words to make this instrument a conveyance on condition, or a mortgage, were omitted by "ignorance or mistake," grounds held sufficient in *Green v. Sherrod,* 105 N. C., 197; *Norris v. McLam,* 104 N. C., 159; *Frazier v. Frazier,* 129 N. C., 30. Indeed when, as was

offered to be shown here, it was agreed between the parties at the time the deed was delivered that it should operate as a mortgage, as against the original grantee, the Court will so decree, though the defeasance clause was not omitted through ignorance, mistake, fraud or undue advantage. *Waters v. Crabtree,* 105 N. C., 394; *Watkins v. Williams,* 123 N. C., 170; *Porter v. White,* 128 N. C., 42; *Fuller v. Jenkins,* 130 N. C., 554.

In *Laxton v. Tilley,* 66 N. C., 327, the words "In consideration of $200 and the faithful maintenance of T. L. and wife" were held a charge upon the land, and there are several cases of like purport. But here the clause is added, "stands good for the support of" the grantor during her natural life, which is stronger, and, taken in connection with the evidence offered that the grantee never accepted or acted upon such contract, but immediately abandoned and altogether failed to act upon the contract, the Judge should not have instructed the jury to return a verdict for the plaintiff, but he should have left it for them, in view of the ignorance of the grantor and the evidence of language cotemporaneous with the execution of the deed, to say whether the intention was to make a conveyance subject to the grantor's lien. If so, the purchase-money not having been paid, the title remained vested in the grantor and passed by her subsequent conveyance to the grantor of the defendant. There was an allegation in the complaint that technical words to express the "condition precedent" were omitted by ignorance or inadvertence. It was error to refuse to submit such issue and evidence to prove it. *Davidson v. Gifford,* 100 N. C., 18.

This was a conveyance upon condition "the land was to stand good," remain the property of the grantor until and unless its owner, Elmira, was "supported during her natural life" by William Helms. Not having complied with this condition, and not having paid a dollar to the support of

Elmira, but having stood by while others were supporting her under a similar contract made after his abandonment of this agreement, William Helms should now recover the land from those who did support Elmira. It would be unconscionable. Being in possession, Elmira could not re-enter for condition broken. *Frost v. Butler,* 22 Am. Dec., 199. It is not conceivable that Elmira contracted that if William Helms did not support her, and should refuse to execute the contract altogether, that she reserved the privilege to bring suit and have him declared a trustee and ordered to reconvey. She had neither the knowledge nor the means to do this, and where would she have gotten a support during the years of such litigation? Her contract, both written and verbal, was dictated by common sense—"the land was to stand good" for her support, and if William Helms did not give the support the land was good, it was to remain hers till the support was completed. No other construction can reasonably and justly be placed upon this agreement of the parties; construed otherwise, it is a nullity.

MARTIN v. CLARK.

(Filed April 26, 1904).

1. MANDAMUS—*County Commissioners—Counties—Const. N. C., Art. 14, sec. 3.*

A mandamus will lie to compel a county treasurer to pay a warrant out of a specific fund, the warrant having been drawn by the county commissioners.

2. PROCESS—*Summons—Jurisdiction—At Chambers.*

Where a summons is improperly made returnable before the judge at chambers, he should not dismiss the action, but transfer it to the civil issue docket.

ACTION by S. M. Martin against W. D. Clark, heard by *Judge W. R. Allen,* at Chambers, December, 1903. From a judgment for the plaintiff, the defendant appealed.

W. A. Cochran, for the plaintiff.
R. T. Poole, for the defendant.

CONNOR, J. The commissioners of Montgomery County issued a warrant upon the treasurer for the sum of $600 payable to the plaintiff "on building bridge at Martin's mill, to be paid out of the special tax funds." The order was presented to the treasurer, who refused to pay it. Thereupon the plaintiff began this action by issuing a summons returnable before the Judge at chambers. In his complaint and in his reply to the defendant's answer, the plaintiff alleges that the defendant treasurer has in his hands, subject to said warrant, an amount more than sufficient to pay the same. He asks that a *mandamus* issue directing and commanding the defendant to pay said warrant. The defendant demurred to the complaint for that the plaintiff's

alleged cause of action was "a money demand," and that the summons should have been returnable to the regular term. The Court overruled the demurrer and the defendant excepted. He thereupon filed an answer. The defendant moved in this Court to dismiss the action for the same cause as that set out in his demurrer.

While the authorities are not entirely clear, we think the action was properly brought. The warrant or order directs the payment of a specific amount out of specific funds, "the special tax funds." The treasurer is a ministerial officer charged with the duty of holding the public funds and paying them out on the warrant of the commissioners. This Court, in answer to the same objection made in *Bearden v. Fullam,* 129 N. C., 477, said: "This is a proceeding, not to litigate a matter to obtain a judgment for money, not to ascertain the defendant's liability on an issue of whether he is indebted to the plaintiffs or not, but to compel a public officer to deposit public funds in his hands in a public depository. It is not a money demand in the sense in which that word is used in the statute." The commissioners having audited and allowed the claim and having issued a warrant for its payment by the treasurer out of a specific fund, it is his duty to do so, provided he has such funds in his hands applicable to such claim. The law commits to the Board of Commissioners the power and duty of auditing and passing upon the validity of claims. If they refuse to audit or act upon a claim, *mandamus* will lie to compel them to do so. *Bennett v. Comrs.*, 125 N. C., 468. If after the hearing they refuse to allow or issue a warrant for its payment, an action will lie against the commissioners to establish the debt and for such other relief as the party may be entitled to. *Hughes v. Comrs.*, 107 N. C., 598. If, however, the summons was improperly made returnable before the Judge at chambers, he should not dismiss the action but transfer

it to the civil issue docket for trial, making such amendments to process and pleadings as might be necessary. *Ewbank v. Turner,* 134 N. C., 80. His Honor properly ordered the alternative *mandamus* to issue with the order to the defendant to show cause at the next term of the Superior Court why a peremptory writ should not issue. The judgment is but an order to show cause and can do no possible harm to the defendant. If he shall show that he has no money in hand applicable to the order, or that the special tax is by law applicable to some other purposes, or any other good and lawful reason for not paying the warrant, the Court will refuse the peremptory *mandamus* and the plaintiff will proceed as he may be advised. It cannot be within the power or duty of the treasurer of the county to refuse to pay a county order issued by the Board of Commissioners because he does not think it a just or lawful claim, or for any other reason, which has been passed upon by the board, and within its power to act. It is different with the State Treasurer. He may refuse to pay a warrant of the Auditor if it appear that the law under which it is issued is unconstitutional, or the claim not within the terms of the statute. Constitution, Art. XIV, section 3. If the county treasurer deem the warrant drawn in contravention of a constitutional provision or limitation he should refuse to pay it. If the Court should so adjudge upon the return to an alternative *mandamus,* no peremptory writ would issue. The judgment is

Affirmed.

SIGMAN v. RAILROAD CO.

(Filed April 26, 1904).

1. APPEALS—*Record—Dismissal—Case on Appeal—Rules of Supreme Court, Nos. 19 and 28.*

Appeals will be dismissed where no index is sent up in the record and printed, and no marginal references prepared.

2. EXCEPTIONS AND OBJECTIONS—*Case on Appeal—Appeal—The Code, sec. 550.*

The exceptions in a case on appeal must be briefly and clearly stated and numbered.

3. CASE ON APPEAL—*Summons—Pleadings—Verdict—Judgments.*

In the case on appeal only enough of the record should be included to show that the case is properly constituted; and this, with the summons, pleadings, verdict and judgment, and the case on appeal setting out so much of the proceedings at the trial as will throw light upon the exceptions taken, is all that is necessary.

4. EXCEPTIONS AND OBJECTIONS—*Instructions—Appeal.*

An exception that the court erred in its charge to the jury is too broad to be considered on appeal.

5. FELLOW-SERVANTS—*Railroads—Acts (Private) 1897, ch. 56.*

The fellow-servant law applies to all railroad employees, whether injured while running trains or rendering any other service.

ACTION by E. M. Sigman against the Southern Railroad Company, heard by *Judge W. R. Allen* and a jury, at November Term, 1903 of the Superior Court of IREDELL County. From a judgment for the plaintiff, the defendant appealed.

Furches, Coble & Nicholson and *R. B. McLaughlin*, for the plaintiff.

L. C. Caldwell, for the defendant.

CLARK, C. J. No index was sent up in the record and printed, nor any marginal references, as required by Rules 19 (2), 19 (3) and 28. As provided by Rule 20 it was therefore optional with the Court to dismiss the action or to postpone its consideration, and in the meantime to refer the record to the Clerk "to put the record in the prescribed shape,' with an allowance to him of five dollars therefor, and an order that execution issue forthwith for that amount and for the cost of printing the additional matter. The Court in this case chose the latter alternative. But these rules are required for the prompt consideration of the business coming up to this Court, and if they are not carefully complied with it will become necessary hereafter to dismiss in cases of their non-observance. The fullest notice to this effect has heretofore been given. *Alexander v. Alexander,* 120 N. C., 472; *Lucas v. Railroad,* 121 N. C., 508; *Pretzfelder v. Ins. Co.,* 123 N. C., 164, 44 L. R. A., 424; *Baker v. Hobgood,* 126 N. C., 152, and *Brinkley v. Smith,* 130 N. C., 226, in which last attention is called to the fact that these requirements must be observed, even in pauper appeals, except only the requirement as to printing.

The record is also defective in not containing the marginal references required by Rule 21, nor are the exceptions "briefly and clearly stated and numbered" in the case on appeal, as required by The Code, section 550, and also by Rule 27. This is imperative, and the attention of the profession is called to this requirement as to stating the exceptions in the case on appeal. The statute and rule would not have been made if experience had not demonstrated that this provision was necessary for the prompt and orderly dispatch of the business coming before us. On the other hand, some records infringe upon Rule 22 by sending up "irrelevant matter not needed to explain the exceptions or errors assigned." *Durham v. Railroad,* 108 N. C., 399; *Mining*

Co. v. Smelting Co., 119 N. C., 415; *Hancock v. Railroad*, 124 N. C., 228. As for instance, in some cases the transcript is incumbered with pages of entries of continuances from term to term, and other proceedings at terms prior to the trial term, which are often sent up when they throw no possible light upon the exceptions assigned. The appellate court does not need a complete history of the cause, but only enough of the record to show that the case is properly constituted, and the summons, pleadings, verdict and judgment (which are the "record proper") and the case on appeal (which should set out so much of the proceedings at the trial as will throw light upon the exceptions taken). The above when properly indexed, with marginal references, and printed, will present to the Court all that is necessary for the proper consideration of an appeal. More than this is an unnecessary expense to the appellant and a hindrance rather than a help to the Court, while less than the above moderate requirements is just ground for dismissal or other appropriate action. It is the duty of the appellant to see to it that the requirements as to the appeal are complied with. Cases cited, Clark's Code (3 Ed.), page 921.

The record in this appeal having been put in shape by the Clerk to whom the transcript was referred and the additional matter printed, the exceptions have now been fully considered. The first exception, that the Court erred in not nonsuiting the plaintiff at the close of the evidence, is without merit. The second exception is that "the Court erred in its charge to the jury." This is "broadside" and cannot be considered. See numerous cases collected in Clark's Code (3 Ed.), pages 513, 514, 773, 921. Neither the appellee nor the Court can be thus called on to grope through the entire charge when the appellant does not specifically point out by an exception wherein he has been hurt by an error therein.

It admits of some surprise that an exception in such terms should still appear in any case sent to this Court.

The other exceptions are to giving special instructions asked by the plaintiff, and for refusing certain instructions asked by the defendant, and for modification of the defendant's third prayer. Upon careful consideration of these matters we find no error therein and nothing requiring discussion in his opinion, as the propositions of law involved have been well settled by numerous decisions which the Judge below carefully followed.

The plaintiff was injured by the negligence of a fellow-servant while working upon and repairing a bridge of the defendant railroad. It is settled that the fellow-servant law, chapter 56, Private Laws 1897, applies to railroad employees injured in the course of their service or employment with such corporation, whether they are running trains or rendering any other service. In *Mott v. Railroad,* 131 N. C., at page 237, it is said: "The language of the statute is both comprehensive and explicit. It embraces injuries sustained (in the words of the statute) by *'any* servant or employee of any railroad company * * * *in the course of his services or employment with said company.'* The plaintiff was an employee and was injured in the course of his service or employment." To same effect, *Railroad v. Pontius,* 157 U. S., 209, cited with approval in *Tully v. Railroad,* 175 U. S., 352; *Railroad v. Harris,* 33 Kan., 416; *Railroad v. Kochler,* 37 Kan., 463; *Railroad v. Stahley,* 62 Fed., Rep., 363, and many other cases.

No Error.

SELF v. SHUGART.

(Filed April 26, 1904).

GUARDIAN AND WARD—*Limitations of Actions—Suretyship—The Code, secs. 154, 155, 163, 169, 1402, 1488, 1510, 1525, 1577, 1580, 1617, 1619—Bonds.*

An action by the ward against the sureties on the bond of the guardian is barred after three years from the time the ward becomes twenty-one years old if the guardian makes no final settlement; and within six years if the guardian makes a final settlement.

MONTGOMERY, J., dissenting.

ACTION by the State on the relation of Annie J. Self and another against J. L. Shugart and others, heard by *Judge W. H. Neal,* at April Term, 1903, of the Superior Court of SURRY County. From a judgment for the plaintiffs the defendants appealed.

Watson, Buxton & Watson and *W. L. Reece,* for the plaintiffs.

Carter & Lewellyn and *Glenn, Manly & Hendren,* for the defendants.

CLARK, C. J. On April 23, 1888, the defendant Shugart qualified as guardian of Annie and James Franklin and gave bond in the penal sum of $150, with Hollifield and McKaughan as sureties. The guardian made no returns to the Clerk (except returning the sale of some real estate May 3, 1888) until September 11, 1902, which was after the plaintiffs had made a demand for settlement in August, 1902. Annie Franklin became of age in April, 1890, and married in January, 1896. James Franklin became of age in April,

1895. The plaintiffs resided in Alabama. No demand for settlement was made on the guardian till August, 1902.

The guardian is insolvent, and the question whether or not he is protected by the statute is not raised. The sole controversy is whether the sureties are released by either the three, six or ten year statute of limitations, all of which are pleaded. If the sureties are released by the failure of the wards to bring suit within three years after arriving of age, neither the subsequent demand and refusal nor the filing a final account, after the statute became a bar, would revive it and set it in motion. Under The Revised Code, chapter 65, section 4, and statutes prior thereto, a delay of the ward for three years after attaining his majority to have a final settlement or to bring suit absolved the sureties from liability. *Johnson v. Taylor,* 8 N. C., 271; *Williams v. McNair,* 98 N. C., 332. But the plaintiffs contend that this is otherwise since the adoption of The Code of Civil Procedure. It has been held expressly against this contention of the plaintiffs in *Norman v. Walker,* 101 N. C., 24. There the guardian qualified in July, 1872, the ward became of age in September, 1876, the guardian died before the ward became of age without having settled his trust or made any of the required returns; in 1887 the ward made his demand upon the sureties and brought action against them. It was held that it was the duty of the guardian within three months after his appointment to exhibit his account under oath to the Clerk of the Court and to make annual returns (The Code, sections 1577, 1580); that his failure to do so was a breach of the bond, and that by The Code, section 155 (6), an action against the *sureties* on the official bond could be brought only within three years thereafter, except that by virtue of section 163 the beginning of the running of the statute as to a minor was postponed till his arrival at age. The plaintiff's contention that the statute ran only from

the filing of a final account (The Code, section 154) was overruled, and *Williams v. McNair,* 98 N. C., 336, was distinguished and held not in point. In *Norman v. Walker, supra,* the guardian having died before the ward became of age, the failure to settle with the ward at his majority was not relied on as a breach, but his failure to file his annual accounts.

In *Kennedy v. Cromwell,* 108 N. C., 1, *Norman v. Walker* was quoted and approved, and it was held:

1. That an action for breach of the bond of an executor, administrator or guardian is barred as to the sureties after three years from the breach complained of. The Code, section 155 (6).

2. That when a final account has been filed, an action to recover the amount shown thereby to be due is barred as to the sureties in six years from the filing of the account. The Code, section 154 (2).

3. Whether a final account is or is not filed, if there is a demand and refusal the principal, as well as the sureties, is absolved from liability if no action is brought within three years thereafter. This is because the refusal puts an end to the trust.

4. When there is neither final account filed nor demand and refusal, whether the executor, administrator or guardian himself is protected by the lapse of six years or ten years was left an open question, though it was intimated that ten years would certainly be a bar.

5. That when no final account has been filed, the statute begins to run from the arrival of the ward at age (The Code, section 163), but whether in such case three years or ten years bars as to the principal, *quære.*

6. When the statute begins to run the subsequent marriage of the *feme* plaintiff will not stop it. The Code, section 169.

These authorities are conclusive that, though there has been a change in the phraseology of the statute, the ward's right of action accrues against his guardian upon his arrival at age, and that the *sureties* on the guardian bond are protected by failure to bring action thereon within three years from any breach by failing to file his final account and settlement with his ward, which it is the guardian's duty to do upon the majority of the ward, while if a final account is filed, though there is no breach of the bond, yet as to the sureties the balance shown by such final account is conclusively presumed to be paid after the lapse of six years.

The general rule is, as above, that the statute of limitations begins to run against the maintenance of an action by the ward against his guardian and his bond at his majority. 15 Am. & Eng. Ency. (2 Ed.), 82, 121, and cases there cited; Angell on Limitations, section 178. The cases relied on by the plaintiffs are *Williams v. McNair,* 98 N. C., 336, which was held not applicable to a case like this by *Norman v. Walker,* 101 N. C., 24; *Woody v. Brooks,* 102 N. C., 334, which was cited and followed in *Kennedy v. Cromwell, supra;* and lastly, *Stonestreet v. Frost,* 123 N. C., 290. This last was an action against an administrator, whose office and duties, unlike those of a guardian, do not expire and absolutely terminate *ex vi termini* at a definite and predetermined date, and it was held that in such case, when there had been a demand and refusal to settle and an action brought within three years thereafter, the sureties were not absolved from liability, although there had been a failure of the administrator prior to the three years before action brought to file his annual account.

We think the true rule is that it is the duty of a guardian to settle with his ward on his arrival at age, and a failure to do this is such breach that if the ward fails to bring action within three years the sureties on the guardian bond are

absolved from liability under The Code, section 155 (6), for such failure to settle is necessarily "the breach complained of" in an action to recover any balance due by the guardian, when no final account was filed, while if such final account is filed in apt time the balance shown thereby to be due the ward is presumed paid (as to the sureties) after six years. As the guardianship ceases *ex vi termini* upon the arrival of the ward at age, the failure of the guardian to settle then is a breach of his duty, for which the ward can maintain an action to recover the amount due, and the failure by the ward to bring such action within three years thereafter must release the sureties on the guardian bond, who have been exposed to an action during these three years, unless a final account is filed showing a balance due, and then the statute is six years. The provision in The Code, section 1619, that the Clerk may require the guardian to file his final account at any time after the lapse of six months from the ward's coming of age, is not intended to bestow upon the guardian the ward's moneys and properties for six months after he becomes of age, nor to deprive him of the right to bring an action to recover them during the period, but simply means that the guardian is presumed to have settled with his ward within such six months, and after its lapse the Clerk can call on the guardian to file his final account, with the receipts of the ward, in full settlement to complete the record in his office, for that section states that such return shall be "audited and recorded." Such final account is intended to be subsequent to the settlement with the ward, not preparatory thereto. The six years statute, not the three years statute, begins to run as to the sureties from this required final return if any unpaid balance is shown, as the six years statute also runs from the final return of the administrator or executor which is required to be filed at the end of two years from his qualification (The Code, section 1402);

but three years after the lapse of such two years is not a bar to an action against the sureties on the bond if the final account is not filed at the end of two years. That the three years runs as to sureties on the guardian bond from the arrival of the ward at age, is held in *Kennedy v. Cromwell,* 108 N. C., 1, paragraph 5 of the headnote.

Upon the facts agreed, judgment should have been entered in favor of the defendant sureties.

Reversed.

MONTGOMERY, J., dissenting. The law in force up to the time of the adoption of The Code of Civil Procedure—August, 1869—in respect to the right of sureties on guardian bonds to obstruct a recovery against them by the ward after a lapse of a statutory time, was in these words: "Any orphan or ward, coming to full age, and not calling on his guardian within three years thereafter for a full settlement of his guardianship, shall be forever barred as to the sureties on the bond of the guardian from all recovery thereon." Chapter 65, section 4 (The Act of 1895), Revised Code. In *Johnson v. Taylor,* 8 N. C., 271, that section of the Revised Code was construed to require more than a mere demand for such settlement. *Hall, J.,* who wrote the opinion, said: "I think it is incumbent on the infant, after arriving at full age, not only to call for a full settlement, but to have a final adjustment of all accounts, matters and things with his guardian in three years, and either sue for any balance that may be due him, or notify the sureties to the guardian bond of the true situation in which he stands to the guardian." The period prescribed for the commencement of a suit against the sureties on bonds of guardians, executors and administrators by the terms of The Code of Civil Procedure, section 34, subdiv. 6 (now subdiv. 6 of section 155 of The Code), is in these words: "An action against the sureties of any

executor, administrator (collector), or guardian on the official bond of their principal; within three years after the breach thereof complained of." There is no similarity in the language of the two provisions of law above referred to; and the section of The Code must have been intended to alter the statutory period in the Revised Code as to the commencement of actions against the sureties on the bonds of executors, administrators and guardians. But what change was intended is not very clearly stated to our minds. The section of the Revised Code was perfectly clear. The three years statute of limitations in all cases of breach of the bond began to run against the ward from the day he became twenty-one years of age as to the sureties. But what is meant by the words "Within three years after the breach thereof complained of" in The Code section is not very clear to me, and I can find no decisions precisely on that point.

There are difficulties connected with this subject. The provisions of the bond of a guardian, as they are required to be by section 1574 of The Code, are stated in terms most general. It is required that the bond must be conditioned that such guardian "shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the Clerk or Judge touching the guardianship of the estate committed to him." Breaches of such a bond may be stated as, first, a failure to preserve and manage the ward's property, including not only that which he has received into his possession but also that which he ought to have received; second, failure to properly care for and support the ward; third, to render an account of the balance to the proper court when required to do so and to the ward when of age; and fourth, to pay that balance to the ward when it is demanded by him. As to any breach of the bond which may occur during the minority of the ward, and which breach may be alleged in a suit by a ward against his guardian after he becomes of age for

a settlement of a balance due to him, as a breach complained of, the rule laid down in The Code is clear. As for example, if the allegation should be that an annual return by the guardian was false, or that the guardian had failed to collect money or to get possession of property belonging to the ward and which he could have collected or gotten possession of, then if the ward did not commence his suit against the sureties on the bond within three years after he became of age a plea of the statute of limitations set up by the sureties would be good, or, if there had been a final account filed by the guardian showing a balance due to the ward, and the ward had demanded the payment of that balance when he became of age, and the guardian had refused to pay it, then there would have been a breach of the bond and the ward be compelled to commence his action against the sureties on his bond within three years from the refusal, or the sureties might obstruct the recovery by pleading the three years statute of limitatations. But in the latter case the law now in force, subdiv. 6 of section 155 of The Code, does not require that the ward shall commence action within three years after his arrival at full age, but only within three years after the breach complained of. Suppose, then, that there had been no breach of the bond by the guardian during the minority of the ward, and that a final account had been filed which was true and satisfactory to the ward, and he should delay for a longer period than three years after the filing of the final account before demand of payment for the amount as due by the final account and refusal to pay the same, the refusal to pay would then be the breach of the bond, and from that time the ward could bring his action within the next three years against the sureties and they could not plead the statute of three years. The six years statute, however, from the filing of the final account by the guardian would obstruct a recovery by the ward for the

reason that it would protect the guardian himself when sued on his official bond (section 154, subdiv. 2 of The Code); and the Court would not permit a surety on the bond to be bound after the principal on the bond was released by law. Of course a guardian who had returned no final account, or who had returned one with an admitted balance against himself in favor of the ward, would not be allowed to plead the statute of limitations.

And certainly he would not be allowed to hold in his hands a fund which he had admitted was due to his ward because of a lapse of time, but the suit would have to be brought against him not on his bond but as trustee. *Woody v. Brooks,* 102 N. C., 334. In the case before us the guardian never made any return to the Court during the minority of the plaintiffs—the wards. More than three years had elapsed after the youngest one of them had arrived at twenty-one years of age. Seven years after that time the defendant guardian made a report in the nature of a final account to the Superior Court in which there was an amount admitted to be due to the plaintiffs. They at once brought this action against the defendants, the guardian and the sureties on his bond. His refusal to pay it, or not paying it when the report was filed, was a breach of the bond; and while in the complaint the failure to make annual returns was stated, yet nowhere was it alleged that they were the breaches of the bond complained of. On the other hand, the plaintiffs accepted the final returns as true and brought an action to recover the amount therein stated, and that was the breach complained of. It may be said that this view of the law, instead of lightening the burdens of securities and freeing them from stale demands has the opposite tendency and effect; but it is to be said that this Court cannot make the laws. Its duty is to construe them when its judgment is asked. I think there is no error.

WALKER, J., concurring in result. The conclusion of the Court that the plaintiffs' cause of action is barred by the statute of limitations is, in my opinion, correct, but I cannot assent to the proposition that the statute begins to run when the ward becomes of age, *or sui juris,* as a ruling to that effect would be in conflict with an express provision of the law. As a general rule, it is true that the statute runs from the time that the infant attains a majority, but an action or proceeding by him against his guardian for an account and settlement of the trust has been made an exception to the rule. It is provided by section 1617 of The Code that every guardian shall, within twelve months from the date of his qualification or appointment, and annually thereafter, so long as any of the ward's estate remains in his control, file in the office of the Clerk of the Superior Court an inventory and account, under oath, of the property received by him, and of the investments made by him, and also of his receipts and disbursements for the past year in the form of debit and credit; and if he fails to render an account, or files an insufficient or unsatisfactory one, he may be compelled by order of the Clerk forthwith to file a full and satisfactory one; and by section 1619 it is provided that the guardian may be required to file his final account at any time after six months "from the ward's coming to full age or the cessation of the guardianship, but such account may be filed voluntarily at any time." It thus appears that by statute the guardian is allowed six months after the ward is of full age within which to account and settle with him, and he may defer the settlement until the expiration of that time if he chooses to do so. No such provision has been made in the case of an executor or administrator, who is required to settle his administration at the end of two years after his qualification, for it is provided as to him that he shall file his final account for settlement at that time (The

Code, section 1402), and that he "shall not hold or retain in his hands more of the deceased's estate than amounts to his necessary charges and disbursements and such debts as he shall legally pay, but all such estate so remaining shall, immediately after the expiration of two years, be divided and delivered or paid to the person entitled thereto in law, or, in the case of an executor, under the will of the deceased." The Code, section 1488.

An action against the sureties of a guardian must be brought by the ward within three years after the alleged breach of the bond. The Code, section 155, subsec. 6. This does not refer necessarily to the failure of the guardian to file his annual account, but to any breach of the bond for which the ward, or any person suing in his behalf, may recover damages.

In our case the breach alleged is that the guardian, after the wards were of age, failed to account and to settle by paying the amount due from him to each of them. This is the substantial breach, the failure to file the annual account being only a technical breach for which the damages would be nominal, unless a substantial injury could be shown. The cause of action, or, to be more accurate, the right of action (*McLendon v. Comrs.,* 71 N. C., 38) accrued when the guardian failed to account and settle at the time fixed by law. It surely was not intended that the guardian should be required to settle, that is, to pay to his ward the amount due by him, until he has filed his final account, provided he does not defer the filing of the account beyond the time prescribed by the statute. The Legislature, for some good and sufficient reason, perhaps because his trust, unlike that of an administrator, may continue during a long period of time, has seen fit to allow a guardian six months after the ward has arrived at full age to put himself in a state of preparedness for a settlement and to file his final account. Whatever may have

been the reason for it, we find it so written in the statute, and to the provision we must give full force and effect.

In order to show that it was not intended there should be a settlement until the time when the final account of the fiduciary is due, or, in other words, that the filing of the account should precede the settlement, we need refer only to several sections of The Code wherein that intention is manifested, premising that in this respect there is no difference between the law as to an executor or administrator and that as to a guardian.

Section 1402 provides that an executor or administrator "may be required to file his final account for settlement at any time after two years from his qualification," and no executor or administrator shall retain after that time any of the deceased's estate, except the amount of necessary charges and disbursements and of unpaid debts (section 1488). Legatees and distributees may sue to recover their legacies and distributive shares at any time after the lapse of two years from the qualification of the personal representative, unless he shall sooner file his final account for settlement. (Section 1510). An executor or administrator, who has filed his final account for settlement, may at any time thereafter petition for settlement of the estate committed to his charge. (Section 1525). Any guardian who wishes to resign must "exhibit his final account for settlement." (Section 1608). These provisions of the statute show conclusively that the Legislature intended the final account always to precede the settlement. How can the ward or the Court know what is due, until after the final account has been filed.

As the guardian cannot therefore be called to account and required to pay over to his ward what is due from him to the latter until six months after the ward has reached his major-

ity, it follows that no action can be brought against him for that purpose until that time has expired.

In *Cooper v. Cherry,* 53 N. C., 323, it is said by *Pearson, C. J.,* for the Court, to be the settled doctrine "that no statute of limitations can begin to run and become a bar until the cause of action accrues, for the plain reason that the Legislature cannot be supposed to intend to require a creditor to do an impossible act under pain of having his right of action barred." The principle thus laid down applies as well to an action by a ward as to one by a distributee or next of kin. The right of action therefore accrued to the wards, in this case, six months after they respectively became of age, and the statute commenced to run from that time and not from the time they reached their majority. It may make no practical difference in this case which time is fixed for the starting of the statute, as much more than three and a half years elapsed between the time the plaintiffs arrived at full age and the commencement of this action; but it may become very important hereafter, in cases in which time will be material, and it is well that the time from which the statute runs, the *terminus a quo*, should be definitely and correctly stated.

The case of *Norman v. Walker,* 101 N. C., 24, is not in point. It appeared in that case that more than three and one-half years had elapsed after the ward became of age and before the suit was commenced and the question was not therefore involved. The same may be said of *Kennedy v. Cromwell,* 108 N. C., 1. The Code, section 155 (6), provides that the action against the sureties of a guardian on his official bond shall be barred within three years after the breach thereof alleged. The breach in this case is the failure to account and settle at the proper time. I do not see why the principle settled by this Court, that the filing of the final account terminates the trust, does not apply. If the filing

of the final account terminates the trust and sets the statute in motion, the failure to file it at the time when it is due must have the same effect. *Vaughan v. Hines*, 87 N. C., 445; *Hodges v. Council*, 86 N. C., 181; *Ivy v. Rogers*, 16 N. C., 58.

DOUGLAS and CONNOR, JJ., concur in the concurring opinion.

FISHER v. BROWN.

(Filed April 26, 1904).

1. GUARDIAN AND WARD—*Interest—The Code, sec. 3835.*

Where a guardian uses the funds of his ward in his own business, he is chargeable with the highest rate of interest allowed by law.

2. GUARDIAN AND WARD—*Commissions.*

Where a guardian uses funds of his ward, but makes regular annual settlements, charging himself with interest thereon, he is entitled to his commissions.

3. EVIDENCE—*Guardian and Ward—Harmless Error.*

Where a guardian's answer in a suit for an accounting contained an admission that he had used the funds of his ward in his own business and for his own benefit, the introduction of evidence of an admission to the same effect, made by the guardian in a proceeding instituted for his removal, was harmless error.

ACTION by J. V. Fisher against R. A. Brown, heard by *Judge W. H. Neal*, at October Term, 1903, of the Superior Court of CABARRUS County. From a judgment for the plaintiff the defendant appealed.

Montgomery & Crowell and *Self & Whitener,* for the plaintiff.

W. G. Means and *Pou & Fuller* for the defendant.

MONTGOMERY, J. The defendant, R. A. Brown, had been removed from the guardianship of Lilly Ury, and this action was then brought by the plaintiff, as the newly appointed guardian, against the defendant R. A. Brown and the other defendants, sureties on his guardian bond, for an account and settlement of the guardianship. The case was referred to the Clerk of the Superior Court to state the account. The report of the referee was filed and confirmed by the Court. The first exception of the defendant which we will consider is the one to the receiving by the referee, as evidence, an admission made by the defendant R. A. Brown in the proceeding instituted for his removal as guardian, to the effect that he qualified as guardian of Lilly Ury for the purpose of using the funds belonging to her in his own business, and that he applied the same to his own purposes. We do not deem it necessary to discuss that exception any further than to say that it was error on the part of the referee to have received that admission in evidence. In any aspect of the case it is harmless error. The defendants in their answer in the present case admitted that the defendant R. A. Brown used the guardian funds in his own business and for his own benefit.

The next exception was to a conclusion of law of the referee, and affirmed by the Court, that the defendant R. A. Brown, because of his having used the funds belonging to the estate of his ward in his own business, should be charged with eight per cent. per annum on the fund up to February 21, 1895 (the date of the change of law of interest), and after that time with six per cent. per annum. The exception cannot be sustained. The point is expressly decided in

Carr v. Askew, 94 N. C., 194. There the defendant guardian had neglected to invest the fund and had applied it to his own purposes, and the Court decided that he should be charged with interest at the highest rate. At that time six per cent. per annum was the general rate, but under section 3835 of The Code as much as eight per cent. interest was allowed to be charged and collected, if there was a special contract in writing signed by the party to be charged therewith, or by his agent to that effect. The referee in that case had made a finding that in Wake County, where the guardian resided, he could have loaned the fund out on proper security at eight per cent. per annum, but that taking into consideration the interval occurring between the taking in and re-loaning of moneys, a continuous rate of seven per cent. per annum would have been the maximum that could have been realized. In that case, on the subject of the rate of interest with which the guardian should have been charged, the Court said: "These exceptions we think cannot be sustained, * * * and for the further reason that the evidence taken by the referee upon that matter varies from six to eight per cent. And we think it was reasonable and just under the proofs that the intermediate sum of seven per cent. should be adopted as the average and maximum of interest with which the defendant should be charged, compounded until the death of his ward in 1883, and with simple interest after that time. As a general rule, when a trustee has not only neglected to invest the fund, but has applied it to his own purposes, as by using it in his trade, he may be charged with interest at the highest rate. Adams Eq., 664. But in this case the defendant had annually made a fair return for thirteen years, and for a good portion of that time charged himself with eight per cent. interest. That is a circumstance which might very properly have been taken into consideration by the referee in exonerating him from being charged with the

highest rate of interest." That language is conclusive that the Court was of opinion that the guardian there would have been chargeable with eight per cent., the special rate allowed by the proviso in section 3835 of The Code, but for the findings of the referee, and that the guardian had charged himself with eight per cent. for a considerable part of the time.

The rate of interest allowed in special contracts under section 3835 is what the Court meant by the *highest rate of interest.*

The only other one of the exceptions of the defendant necessary to be considered was a conclusion of law arrived at by the referee, and affirmed by the Court, that the defendant R. A. Brown, having used his ward's money in his own business, and having never otherwise invested it, should not be allowed commissions on the interest or income from the fund in his hands belonging to the estate of his ward. That exception must be sustained on the authority of *Carr v. Askew, supra.* On a similar exception to the one raised in the case before us the Court there said: "We think this exception should be sustained. It was held by this Court in *Burke v. Turner,* 85 N. C., 500, 'that a guardian is not entitled to commission on money collected and used by him in his own business,' but that was a case where the guardian not only used the money in his own business but was guilty of gross negligence in not making his returns. * * * In this case, although the guardian used the money of his ward for his own purpose, he made his annual returns with strict punctuality and fairness for thirteen years, so that it might be seen at all times for what sum he was liable to his wards, and he and his sureties were perfectly responsible. Although he violated the law, and abused the trust reposed in him by the use of his ward's money, we

do not think it was such gross malfeasance as should exclude him from the right to be allowed commissions."

In the case before us, the defendant R. A. Brown, guardian, made regular returns throughout the whole period of his guardianship and charged himself with six per cent. interest. The cases are similar on the point of commissions to be allowed and the exception is sustained.

We have examined the other exceptions of the defendant and we find that they are without merit and ought not to be sustained. The parties to this action can, when the certificate of this opinion is received in the Court below, by consent, have the judgment of the Superior Court modified to the extent of having commissions allowed to the defendant Brown as above set out, to save the trouble and expense of having the matter recommitted to the referee to make the allowance of commissions.

Modified and Affirmed.

CLARK, C. J., concurring. The rule laid down in *Carr v. Askew,* 94 N. C., 194, and reaffirmed in this case, that when a fiduciary has used the trust funds in his own business he is to be charged with the highest rate of interest, unless he is shown to have made more, when he is chargeable with the actual profits made, is based upon the sound reasons given in the opinion of the Court. It is also sustained by the precedents. In the absence of all evidence as to profits, the fiduciary in such cases is chargeable with the highest permissible rate at which he could have loaned the money, and the burden is on him to show that he made less (3 Williams Exrs., 404, 7 Am. Ed., and cases cited), though in all cases when he himself uses the money he is chargeable not less than the ordinary rate of interest, even though he should not have made so much. *Wedderburn v. Wedderburn,* 20 Beavan, 100; *Treves v. Townshend,* 1 Bro. C. C., 384; *Heathcote v. Hulme,* 1 J. & W. Ch., 135, which last

directed "an inquiry whether the account of interest or profits will be most advantageous to the infants." In the English cases three per cent. is taken as the usual and five per cent. as the highest allowable rate (corresponding to the six and eight per cent. under our former statute), and in all cases the fiduciary using trust funds is charged with five per cent. unless his profits therefrom were greater, in which case he is chargeable with them; or unless he shows the profits were less, in which case he is charged therewith, but never less than three per cent., at which it was his duty to have loaned the money. *Lord Cramworth* in *Robinson v. Robinson,* 1 DeG., M. & G., 257. Where the fiduciary does not use the money, but merely fails to loan it or to invest it, he is chargeable only with the ordinary and usual rate of interest, the amount which he should have made for the trust fund if he had not been negligent. *Rocke v. Hart,* 11 Ves., 61. The whole doctrine is summed up and restated as above by *James, L. J.,* in *Vyse v. Foster,* L. R. (1872-3), 8 Ch. App., at page 329, and in 3 Williams Exrs., *ut supra.*

CONNOR, J., concurring. The referee does not find as a fact, nor is there any suggestion, that the guardian could have loaned the money of his ward at eight per cent. interest. I am of the opinion that in the absence of this finding he should not be charged with more than the legal rate of six per cent. In *Carr v. Askew,* 94 N. C., 194, the referee found as a fact that the guardian could, during the period of his guardianship, have loaned the money in Wake County upon safe personal security or real estate mortgage at eight per cent. This finding clearly distinguishes the two cases. In that case the referee also found that, taking into consideration the intervals occurring between the taking in and re-lending of loans, a continuous rate of seven per cent. would have been the maximum that could have been realized. The Court, adopting this conclusion, charged the guardian with

only seven per cent., notwithstanding the fact that he used the money in his own business. In that case the entire sum of $10,000 came into the hand of the guardian from an insurance policy, whereas in this case the guardian entered upon the duties of his office with less than $2,000, and receiving rents, income, etc., in small amounts, has so managed his trust that after educating his ward he has in hand for her $6,000. If he is to be punished for the use of the money in his own business, which was clearly improper, it would seem that, accounting for every cent which came into his hands, with interest for every day, would be a sufficient reminder of the duties which he assumed as guardian. For these reasons we cannot concur in the opinion of the Court by which he is charged with eight per cent. interest.

WALKER, J., concurs in opinion of CONNOR, J.

DRUM v. MILLER.

(Filed April 26, 1904).

1. NEGLIGENCE—*Schools—Damages—Teachers.*

An act done by a teacher in the exercise of his authority, and not prompted by malice, is not actionable, though it may cause permanent injury, unless a person of ordinary prudence could reasonably have foreseen that a permanent injury would naturally or probably result from the act.

2. NEGLIGENCE—*Schools—Damages.*

In an action against a teacher for injuries to a pupil, caused by the teacher throwing a pencil at the pupil, which permanently injured his eye, an instruction that unless the jury found that a reasonably prudent man might reasonably or in the exercise of ordinary care have expected that the injury complained of would result from his act in throwing the pencil, defendant should be found not liable, was erroneous.

DRUM *v.* MILLER.

ACTION by Arthur Drum against Abel S. Miller, heard by *Judge T. J. Shaw* and a jury, at January (Special) Term, 1903, of the Superior Court of CATAWBA County.

This is an action brought by the plaintiff to recover damages for an injury to one of his eyes, which is alleged in the complaint to have been caused by the wrongful and negligent act of the defendant. There is not much dispute about the facts. At the time the injury was received the defendant was a teacher in a public school of Catawba County and the plaintiff was one of his pupils. While the school was in session, and plaintiff's class was reciting one of its lessons, the attention of the plaintiff was attracted by some disturbance in the school-room, and when he turned his head to see what it was the defendant threw at him a pencil which he at the time had in his hand. The plaintiff turned his head back just at the time the pencil reached him and it struck him in the eye, inflicting a very painful and serious wound, and causing partial, if not total, blindness. The plaintiff insisted that the act of the defendant in throwing the pencil was done maliciously and that, even if there was no malice, the injury to the plaintiff was a permanent one and, in either view of the case, the defendant was liable to him without regard to any question of negligence or of proximate cause. The defendant contended on the contrary that there was no malice, and that if a permanent injury was the result of the act he threw the pencil at the plaintiff for the purpose of attracting his attention and in the exercise of his right of correction and discipline, without intending to cause any injury to the plaintiff, and not foreseeing, at the time, that such a result would flow from his act. Without objection, the Court submitted to the jury two issues, as follows: "(1) Did the defendant wrongfully injure plaintiff, as alleged in the complaint? (2) What damage, if any, is plaintiff entitled to recover?"

There were no prayers for instructions asked by the plaintiff. The Court charged the jury as follows: That, if they believed the evidence, they should find "That the defendant was a school-teacher, and that plaintiff was his pupil and was reciting his lesson at the time of his alleged injury. A teacher has the authority to inflict upon his pupil such punishment as in his judgment may be necessary for the purpose of correction, and unless such punishment shall seriously endanger the life, limb or health of the pupil, or shall disfigure him or cause some permanent injury to him, or was inflicted not in the honest discharge of his duty as a teacher but under the pretext of duty to gratify his malice, then the teacher would not be responsible for the injury to the child, or if the injury was not the proximate cause of the punishment the teacher would not be responsible therefor." "An act is the proximate cause of an injury either when it is the direct cause thereof, or when the injury is the natural and probable consequence of the act, and when in the exercise of ordinary care an ordinarily prudent person would have foreseen that such consequences would likely be produced thereby. A party is presumed to have intended the necessary as well as the natural and probable consequence of his acts." The Court then explained to the jury what is malice, and further charged them that if the plaintiff was inattentive and defendant threw the pencil at him for the purpose of punishing him, and inflicted a permanent injury upon him, or if he threw the pencil at the plaintiff for the purpose of gratifying his malice, and injured him, and the injury was proximately caused by the throwing of the pencil, they should answer the first issue Yes; but if they found that the pencil was thrown not for the purpose of punishing the plaintiff but to recall his attention to the recitation, and they further found from all the surrounding circumstances that a reasonably prudent man, in the exer-

cise of ordinary care, would not have foreseen that an injury would likely have resulted therefrom, then they should answer the first issue No, although they should further find that the plaintiff was permanently injured, for if injured under such circumstances it was an accident, an accident being an event from a known cause. The jury were further instructed that unless they found from the evidence that plaintiff's injury was the natural and probable consequence of defendant's act in pitching or throwing the pencil, and unless they found that a prudent man might reasonably, or in the exercise of ordinary care, have expected or anticipated that the injury would likely result from the defendant's act, they should answer the first issue No. The Court then gave the defendant's second prayer for instructions, as follows: "Unless you find from the evidence that the plaintiff's injury was the natural and probable consequence of the defendant's act in pitching or throwing the pencil, it will be your duty to answer the first issue No"; and also the defendant's third prayer, as follows: "Unless you find from the evidence that a reasonably prudent man might reasonably, or in the exercise of ordinary care, have expected or anticipated that the injury complained of would likely result from the defendant's act in throwing or pitching the pencil, you should answer the first issue, No."

The jury answered the first issue "No," and therefore did not answer the second. There was a judgment in accordance with the verdict in favor of the defendant, and the plaintiff appealed.

T. M. Hufham, for the plaintiff.
Self & Whitener, for the defendant.

WALKER, J., after stating the case. Several exceptions were taken by the plaintiff to the Judge's charge, only two of which we deem it necessary to notice. One of these

exceptions is based upon the plaintiff's contention that if he was permanently injured by the act of the defendant he is entitled to recover, whether that act was the proximate cause of the injury or not, or could or could not reasonably have been foreseen. We cannot agree with the plaintiff in this contetion. It is undoubtedly true that a teacher is liable if, in correcting or disciplining a pupil, he acts maliciously or inflicts a permanent injury, but he has the authority to correct his pupil when he is disobedient or inattentive to his duties, and any act done in the exercise of this authority and not prompted by malice is not actionable, though it may cause permanent injury, unless a person of ordinary prudence could reasonably foresee that a permanent injury of some kind would naturally or probably result from the act. There is a distinction, we think, between the case of an injury inflicted in the performance of a lawful act and one in which the act causing the injury is in itself unlawful or is, at least, a wilful wrong. In the latter case the defendant is liable for any consequence that may flow from his act as the proximate cause thereof, whether he could foresee or anticipate it or not; but when the act is lawful, the liability depends not upon the particular consequence or result that may flow from it, but upon the ability of a prudent man, in the exercise of ordinary care, to foresee that injury or damage will naturally or probably be the result of his act. In the one case he is presumed to intend the consequence of his unlawful act, but in the other, while the act is lawful, it must be performed in a careful manner, otherwise it becomes unlawful, if a prudent man in the exercise of proper care can foresee that it will naturally or probably cause injury to another, though it is not necessary that the evil result should be, in form, foreseen. Cooley, in his work on Torts (2 Ed.), page 74, states the rule thus: "1. In the

case of any distinct legal wrong which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary and proximate result. Here the wrong itself fixes the right of action; we need not go further to show a right of recovery, though the extent of recovery may depend upon the evidence. 2. When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events, and as a proximate result of a sufficient cause. 3. If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." Pollock, in his treatise on Torts, pages 14 to 35, discusses with great clearness and apt illustration this subject of proximate cause in its relation to the liability of persons for civil wrongs, and the following general principles (the most of them expressed in his words) may be gathered therefrom. A tort is an act or omission (not being merely a breach of duty arising out of a personal relation or undertaken by contract) which is related to harm suffered by a determinate person in the following ways: (1) It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm and does cause

the harm complained of. (2) It may be an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting. (3) It may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented. (4) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound, absolutely or within limits, to avoid or prevent. A special duty of this kind may be (1) absolute, (2) limited to answering for harm which is assignable to negligence. In some positions a man becomes, so to speak, an insurer to the public against a certain risk, in others he warrants only that all has been done for safety that reasonable care can do.

The commission of an act specifically forbidden by law, or the omission or failure to perform any duty specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury. Where the harm that ensues from the unlawful act or omission is the very kind of harm which it was the aim of the law to prevent (and this is the commonest case), the justice and necessity of this rule are manifest without further comment. Even if the mischief to be prevented is not such as an ordinary man would foresee as the probable consequence of disobedience, there is some default in the mere fact that the law is disobeyed (at any rate, a court of law cannot admit discussion on that point), and the defaulter must take the consequences.

"Then we have the general duty of using due care and caution. What is due care and caution under given circumstances has to be worked out in the special treatment of negligence. Here we may say that, generally speaking, the standard of duty is fixed by reference to what we should expect in the like case from a man of ordinary sense, knowl-

edge, and prudence." In cases of tort the primary question of liability may itself depend, and it often does depend, on the nearness or remoteness of the harm or injury, and the liability itself must be founded on an act which is the immediate cause of the harm or injury to a right, the rule of the law being that the proximate, and not the remote, cause is to be regarded. For, says Bacon, "It were infinite for the law to judge the causes of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree." For the purpose therefore of civil liability, in the law of torts, those consequences and those only are deemed immediate and proximate or natural and probable which a person of average competence and knowledge, being in the like case of a person whose conduct is in question and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct. This is only where the particular consequence is not known to have been intended or foreseen by the actor. If proof of that be forthcoming, whether the consequence was immediate or not does not matter. That which a man actually foresees is to him, at all events, natural and probable. Pollock on Torts, page 21. In the case of wilful or intentional wrongdoing we have an act intended to do harm, and harm done by it and the inference of liability from such an act may seem a plain matter under the general rule of liability, and assuming that no just cause of exception to it is present, "It is clear law that the wrongdoer is liable to make good the consequences, and it is likewise obvious to common sense that he ought to be. He went about to do harm, and having begun an act of wrongful mischief he cannot stop the risk at his pleasure nor confine it to the precise objects he laid out, but must abide it fully and to the end." The principle is commonly expressed in the maxim that a man is presumed

to intend the natural consequences of his acts. The doctrine of natural and probable consequences is most clearly illustrated, however, in the law of negligence, for there the substance of the wrong itself is failure to act with due foresight. It has been defined as "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do," and, for the purpose of civil liability, the definition is sufficient and adequate, perhaps, to indicate the kind of act, or failure to act, which may be regarded as the immediate or proximate cause of any consequent harm or injury, for the prudent man to whose ideal behavior we are to look as the true standard of duty will be guided by a reasonable estimate of probability and will not neglect what he can forecast as probable, but will order his precaution by the measure of what appears likely in the known course of things. If he fails so to order his conduct and injury results, he is justly held to be the responsible author of it.

While, as we have said, a person charged with negligence is liable only for those injuries which a prudent man in the exercise of care could have reasonably foreseen or expected as the natural and probable consequence of his act or his omission of duty, it must not be supposed that the principle thus stated requires that he should have been able to foresee the injury in the precise form in which it in fact resulted, or to anticipate the particular consequence which actually flowed from his act or omission of duty. "It is not an essential element of negligence that the defendant should have anticipated, or have had reason to anticipate, that his carelessness would injure another person. The improbability of injury to another is a circumstance that might be taken into account, but which is not conclusive of the question. If, however, no reasonable person could have anticipated that injury

to another *might* ensue, we think that there could be no negligence. It is certainly not essential that the negligent person should have anticipated injury to the particular person who was in fact injured, or the particular kind of injury produced." 1 Sher. & Redf. on Neg. (4 Ed.), section 21.

It is quite sufficient to satisfy the principle and to bring any case within its operation that the party complained of should be able, in the exercise of the care of a man of ordinary prudence, to foresee that harm or injury will result without reference to the particular kind. If he had or should have had this foresight, he is in no better case than the man who intends to do and actually does harm, so far as liability for the natural and probable consequence of his act or conduct is concerned. We believe this to be the doctrine to be gathered from the teachings of the text writers and the decided cases, and the principle that a man is liable for those consequences only which an ordinarily prudent man can foresee as likely to flow from his acts, is, when thus restricted and understood, undoubtedly the correct one. It seems to be in consonance with a just appreciation of the causal connection which should exist between the act and the consequence of it, in order to create civil liability. There is no sound or valid reason, so far as we are able to see, why the very injury that was inflicted by the wrongful or negligent act should have been foreseen, for if the person complained of actually intended any harm to him who was injured by his act, it is conceded that he is liable, without regard to the particular nature of the injury, and there is no way of distinguishing such a case from one in which an act is negligently done which the party doing it could well see at the time would cause harm, or injury in its general sense, to another. There may be a difference in degree but not in principle. In the one case there is an actual inten-

tion, while in the other there is an implied intention, which the law will not ordinarily permit to be contradicted, because it is a just and reasonable rule, as it is a maxim of the law, that a person is presumed to intend that which is the natural consequence of his act. When therefore a wilful wrong is committed or a negligent act which produces injury, the wrongdoer is liable, provided in the latter case he could have foreseen that harm might follow as a natural and probable result of his act, for if he can presume that harm might naturally and probably follow, he must necessarily intend that it should follow or he must have acted without caring whether it would or not, which, in effect, is the same thing. It may be stated as a general rule that when one does an illegal or mischievous act which is likely to prove injurious to another, or when he does a legal act in such a careless or improper manner that he should foresee, in the light of attending circumstances, that injury to a third person may naturally and probably ensue, he is answerable in some form of action for all of the consequences which may directly and naturally result from his conduct. It is not necessary that he should actually intend to do the particular injury which follows, nor indeed any injury at all, because the law in such cases will presume that he intended to do that which is the natural result of his conduct in the one case, and, in the other, he will be presumed to intend that which, in the exercise of the care of a prudent man, he should see will be followed by injurious consequences. In the case of conduct merely negligent, the question of negligence itself will depend upon the further question whether injurious results should be expected to flow from the particular act. The act, in other words, becomes negligent, in a legal sense, by reason of the ability of a prudent man, in the exercise of ordinary care, to foresee that harmful results will follow its commission. The doctrine is thus expressed, and many authorities

cited to support it, in 21 A. & E. Ency. Law (2 Ed.), page 487: "In order, however, that a party may be liable for negligence, it is not necessary that he should have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient, if, by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected."

It is not essential therefore, in a case like this one, in order that the negligence of a party which causes an injury should become actionable, that the injury in the precise form in which it in fact resulted should have been foreseen. It is enough if it now appears to have been a natural and probable consequence of the negligent act, and the party sought to be charged with liability for the negligence should have foreseen by the exercise of ordinary care that some mischief would be done. 1 Thomp. Com. on Neg., section 59. In determining whether due care has been exercised in any given situation of the party alleged to have been negligent, reference must be had to the facts and circumstances of the case and to the surroundings of the party at the time, and he must be judged by the influence which those facts and circumstances and his surroundings would have had upon a man of ordinary prudence in shaping his conduct if he had been similarly situated. *Hill v. Windsor,* 118 Mass., 251.

Applying these general principles to the case in hand, we find that the defendant occupied that relation toward the plaintiff, who was his pupil, which entitled him to use such means for the purpose of correction and discipline as in his judgment were required under the circumstances, provided that he neither acted from malice nor inflicted permanent injury. *State v. Pendergrass,* 19 N. C., 365, 31 Am. Dec.,

416; *State v. Long*, 117 N. C., 790. The law on this subject is thus well stated: "It is the duty of the teacher to enforce the rules and regulations adopted for the government of a school and to maintain discipline in the school, and in order to maintain discipline and compel obedience to any lawful regulation, the teacher may inflict corporal punishment upon a pupil, since the teacher for the time being stands, to some extent, at least, *in loco parentis*, and has such a portion of the powers of the parents delegated to him, namely, that of restraint and correction, as may be deemed necessary to answer the purposes for which he is employed." Am. & Eng. Ency. (2 Ed.), page 244. And by another writer it is thus stated: "The teacher has the power to enforce obedience to the rules and to his commands. One of the means recognized by the law is corporal chastisement. He may thereby inflict temporary pain, but not seriously endanger life, limbs, or health, or disfigure the child, or cause any other permanent injury. He cannot lawfully beat the child, even moderately, to gratify his own evil passions; the chastisement must be honestly inflicted in punishment for some dereliction which the pupil understands. Plainly, if the teacher keeps himself within these limits and his lawful jurisdiction, he must decide the question of the expediency or necessity of the punishment and its degree; it is impossible he should inflict it without." Bishop on Non-Contract Law, section 596, page 269.

If when the case is again tried the jury find that the defendant acted maliciously, he will of course be liable to the plaintiff for the consequent injury and damage, as was fully and clearly explained in the charge of the Judge at the last trial; but if he inflicted a permanent injury in attempting to enforce the discipline of his school, and in so doing failed to exercise ordinary care, he will still be liable to the plaintiff if the jury further find that the injury was

the natural and probable result of his negligence, and that the defendant, in the light of the attending circumstances and in the exercise of ordinary care, ought reasonably to have foreseen that a permanent injury would be the natural and probable consequence of his act.

The Court had charged the jury correctly, in accordance with the foregoing principles, until it gave the instruction contained in the defendant's third prayer. By that instruction the jury, before they could return a verdict for the plaintiff, were required to find that the defendant was at the time able to foresee, by the exercise of ordinary care, not only that injury would result but that the particular injury which was received by the plaintiff would be the natural and probable consequence of his act. It is very likely that this instruction had great weight with the jury in deciding the case against the plaintiff, and we can well see how he might have been, and no doubt was, seriously prejudiced thereby. The language of *Gaston, J.*, in *State v. Pendergrass,* 19 N. C., at page 367, will be appropriate in this connection, as he states the rule of responsibility in such cases with his usual clearness: "We think that the instruction on this point should have been that unless the jury could clearly infer from the evidence that the correction inflicted had produced, or was in its nature calculated to produce, lasting injury to the child, it did not exceed the limits of the power which had been granted to the defendant. We think, also, that the jury should have been further instructed that however severe the pain inflicted, and however in their judgment it might seem disproportionate to the alleged negligence or offense of so young and tender a child, yet if it did not produce nor threaten lasting mischief it was their duty to acquit the defendant, unless the facts testified induced a conviction in their minds that the defendant did not act honestly in the performance of duty,

according to her sense of right, but, under the pretext of duty, was gratifying malice."

There the liability was made to depend upon the question whether the act charged to have been negligent threatened *lasting* injury. We can add nothing to what is so well said by that wise and learned Judge.

There was error in giving the defendant's third prayer for instruction which entitles the plaintiff to another trial. We cannot consider this error as cured by the other parts of the charge, though in themselves correct. *Edwards v. Railroad,* 129 N. C., 78; S. C. 132 N. C., 101; *Williams v. Haid,* 118 N. C., 481; *Tillett v. Railroad,* 115 N. C., 662. The rule in this respect is well settled in those cases.

New Trial.

DOUGLAS, J., concurs in result *arguendo.*

JONES v. COMMISSIONERS.

(Filed May 3, 1904).

1. VENUE—*At Chambers—At Term—Summons—Waiver—Exceptions and Objections.*

An objection that the summons was made returnable at chambers instead of at term is waived by failure to move to transfer the case to the proper docket.

2. VENUE—*Summons—At Chambers.*

Where a summons is improperly made returnable at chambers, it should not be dismissed, but transferred to the proper docket.

3. MANDAMUS—*Bonds—Counties—County Commissioners.*

A mandamus is the proper remedy to compel county commissioners to issue bonds ordered by the general assembly.

4. MANDAMUS—*Bonds—Counties—County Commissioners—Acts 1903, ch. 289.*

An act "authorizing and empowering" county commissioners to issue bonds is not mandatory.

CONNOR and MONTGOMERY, JJ., dissenting.

ACTION by W. W. Jones against the Commissioners of Madison County, heard by *Judge E. B. Jones,* at Chambers, Asheville, N. C., October 21, 1903.

The plaintiff, as receiver of the Western Carolina Bank, is the owner of eighteen coupon bonds of Madison County, aggregating $21,000, issued by the county of Madison by virtue of an act of the General Assembly of North Carolina, entitled "An act to settle the indebtedness of Madison County," ratified March 7, 1887, chapter 398, Laws 1887. They were issued to pay the necessary expenses of said county. The interest upon said bonds is payable as stated therein, and they mature and become due in the year 1907. In addition to said bonds the plaintiff is the owner of a certain warrant of indebtedness duly issued by said county for the sum of $5,155.16, which represents interest due and unpaid upon said bonds up to and including June 1, 1901, but upon this warrant of obligation there are certain credits, as stated in the findings of fact embraced in the judgment of his Honor. There is likewise interest due and owing to the plaintiff upon the coupons yet attached to said bonds and upon said warrant, as stated in said judgment and findings of fact of the Court below.

Under Public Laws, 1903, chapter 283, entitled, "An act to liquidate and settle the outstanding indebtedness of Madison County and to authorize the issue of a series of bonds for the purpose of paying off the bonds, floating debts and other claims now outstanding against the county of Madison, contracted for the necessary expenses of said

county," it is claimed by the plaintiff that it became the duty of the defendants, the Board of Commissioners of Madison County, to issue certain bonds not to exceed the amount of $75,000, with which, or the proceeds of which, to refund and pay off and discharge said bonds and certain other indebtedness of the county of Madison therein mentioned.

The plaintiff, and those under whom he derived his title to said bonds and other indebtedness against the county of Madison at various times demanded of the Board of Commissioners of Madison County that they issue said bonds as provided by said Act of 1903; and at a meeting of said board held April 20, 1903, it was resolved by the same that said bonds be issued to an amount sufficient to pay off said indebtedness of said county, not to exceed $75,000; but at a subsequent meeting of said board held on or about the first Monday in May, 1903, the said board revoked its order of April 20, 1903, and then refused, has since refused and still refuses to issue said bonds; whereupon the plaintiff again made demand upon said board that they issue said bonds and in all things comply with the provisions of said Act of 1903. Said board again refused to issue said bonds for the reasons stated in their exceptions filed to the judgment; whereupon this proceeding was instituted by the plaintiff against the defendants for the purpose of compelling them, by *mandamus,* to issue said bonds and in other respects comply with the provisions of said Act of 1903. Upon the hearing of this case before his Honor the Judge of the Superior Court, it was adjudged that the plaintiff was entitled to the relief demanded in his complaint. The defendants duly excepted to said judgment and appealed.

Charles E. Jones and *Davidson, Bourne & Parker,* for the plaintiff.

T. S. Rollins and *Gudger & McElroy,* for the defendants.

CLARK, C. J. The first exception is that the summons was returnable before the Judge at chambers, when the action being for a money demand should have been returnable before the Court at term. But if that be conceded, yet, as held in *Ewbank v. Turner,* 134 N. C., 77, whether an action is returnable before the Judge at chambers or at term or before the Clerk, it is all before the same Court, and if brought before the wrong department the remedy is the same as when action is brought in the wrong county. There is no defect of jurisdiction but an error as to venue merely, and the remedy is for the Court, either *ex mero motu* or on motion, to transfer the case to the proper docket. The defendant, not having made such motion, has waived his objection. Here the summons is returnable at chambers, but on a day during the term of court. Authorizing an action to be brought before the Judge at chambers is simply intended as a convenient practice in cases where no jury is required in order to expedite a decision. If it turns out that there are issues of fact requiring a jury, there is nothing to be gained to any one by dismissing the action. It should simply be transferred to the docket at term time for trial. It would seem, moreover, that this action was properly made returnable at chambers. The amount is determined, and it is not sought to recover judgment therefor. The relief asked is a *mandamus*, not against the treasurer to pay any money, but to compel the County Commissioners to issue bonds. *Ducker v. Venable*, 126 N. C., 447; *Railroad v. Jenkins*, 68 N. C., 503.

A better founded exception is that the act, Laws 1903, chapter 289, is not mandatory. The preamble recites that the county has an outstanding bonded indebtedness of $21,000 bearing six per cent. interest, and the county will be unable to pay the same at maturity, and that it is to the best interest of the tax payers that the bonds shall be renewed before maturity at a lower rate of interest, and also that the floating

indebtedness of the county, incurred for necessary expenses, should be funded by issuing a new series of bonds to cover the entire indebtedness of the county, and it is thereupon provided by section 1 that the Board of Commissioners are "authorized and empowered" to issue not exceeding $75,000 in bonds bearing five per cent. interest. Section 3 "authorizes the commissioners to lay an annual special tax to meet the interest and principal. By section 8 the County Commissioners are "authorized, empowered and directed" to audit and ascertain and adjust the amount of the floating debt, and no bonds to be issued for any part of said debt unless two (of the three) commissioners shall pass upon and allow the same. Section 10 "authorizes" the County Commissioners to retire the outstanding bonds by selling so many of the bonds issued under this act as may be necessary. Section 19 provides, *"If the bonds authorized by this act are issued,"* the Board of County Commissioners shall levy a sufficient tax to pay the principal and interest, as already stated in section 3.

It would be a singular proceeding, and without precedent, we believe, in this State, if the Legislature should assume to know the wishes and interests of the people of any county better than the County Commissioners elected by them to administer county business, and should peremptorily command the commissioners to issue bonds to fund a floating indebtedness, and in advance of the maturity of the bonded debt should order it refunded by new bonds for a time and at a rate fixed by the General Assembly. The long-settled custom has been to authorize and empower the local legislature, the Board of County Commissioners, to take such steps as may be necessary to fund or refund the debts, with certain limitations upon the rate of interest and duration of the bonds to be issued. Certainly, if the Legislature can order a county to issue bonds, it could as easily fix the interest at

one figure as another. If the Legislature had this power, a casual majority could practically confiscate all property in any county by directing the issue, by counties named in the respective acts, of large amounts of bonds and at an excessively high rate of interest, regardless of the wishes of the tax payers of such county. Unlike State bonds issued by legislative authority, action could be brought in the courts on county bonds thus required to be issued by legislative authority and payment coerced. The assumption of a power so unprecedented, so contrary to the spirit of local self-government, and so liable to abuse, should be carefully scrutinized by the courts. We are relieved, however, in this case of the necessity of passing upon the power of the General Assembly to compel a county to issue bonds against its will, for it will be seen from the above extracts from the statute that the Legislature clearly intended no more than to authorize and empower the County Commissioners to issue "not exceeding seventy-five thousand dollars." It is for the courts, not the General Assembly, to order the payment of debts, whether by counties or individuals. The courts certainly could not compel the issuance of these bonds unless the Legislature has both ordered the county peremptorily to issue the bonds and had authority so to do.

In *Tate v. Comrs.*, 122 N. C., 812, the Court, speaking of counties, says: "They are but agencies of the State government. * * * They are subject to legislative authority which can direct them to do as a duty all such duties as they can empower them to do." The Court was there speaking of counties in respect to their governmental functions, as to which the counties are merely agencies of the State government and can be abolished, created or changed at the legislative will. The making of public roads is a public governmental function, and it was held that the Legislature could either empower or order the making of these roads,

in which the people of the State generally have an interest, and direct that the county shall lay a tax to pay for the construction of the road. But so far as the counties are business agencies of the people of a locality, whether county or municipality, the State cannot interfere to make them create a debt or contract, or extend it (as here), or change the terms of the contract or authorize its violation. This distinction in the double function of counties and municipalities as governmental agencies on the one hand, in respect to which they cannot be sued and as to which they are subject to legislative control, and on the other hand their liability as business agencies of the people of the locality, as to which hence they can be sued and the Legislature has no power to control nor to create or relieve from liability, has been drawn in many cases. See *McIlhenny v. Wilmington,* 127 N. C., 146, 50 L. R. A., 470, and cases there cited. The Constitution, Article V, section 6, uses the words "with the special approval of the General Assembly," and not "by special command of the General Assembly."

The plaintiff relies upon an expression in section 11 of chapter 289, Laws 1903, that if any creditor shall desire to exchange his bonds or other evidence of indebtedness "for one or more of the bonds *hereby authorized,*" it shall be the duty of the commissioners to make such exchange at par. But construed with the context, this means no more than the expression in section 19 of the act, "If the bonds authorized by this act are issued" the Board of Commissioners shall levy a tax, etc.

If the General Assembly has power to order a county to issue bonds, those acquainted with practical legislation and "senatorial courtesy" know that this important power will be in effect placed in the hands solely of those who for the moment represent the county in the General Assembly, and at a time when they will have small opportunity to consult

the wishes and interests of their constituents, and when, on the other hand, the agents and attorneys of those who desire to receive the bonds will be not only present in person but very ready with their arguments and advice. It is true the Legislature can abolish counties at will (*Mills v. Williams*, 33 N. C., 558), and repeal municipal charters, so far as counties and municipalities are governmental agencies, but so far as they are business agencies of the people of the locality to create indebtedness the Legislature cannot impair the obligation of the contract. Can the Legislature then compel the creation of a contract by a county by ordering the issue of bonds for thirty years, when the people thereof may prefer a shorter or longer term, and may be able to secure a lower rate of interest. Whether the Legislature has the constitutional power to take such a departure from precedent and can itself order the issuance of bonds, instead of authorizing and empowering the County Commissioners to do so (subject to the restraining power of the Court if an excessive amount or an excessive interest is contemplated, a restraint which would not attach to an issue made by legislative command), is happily a matter not before us, for the General Assembly in this statute has explicitly and clearly, and in the usual form, merely authorized and empowered the Board of County Commissioners to issue "not exceeding $75,000" to fund the floating indebtedness (the amount thereof to be ascertained by the commissioners) and to refund the bonded indebtedness which will mature in 1907. The General Assembly has not attempted to force the hands of the defendant Board of County Commissioners. It is true that the County Commissioners, at a called session of April 20, being advised by counsel that the act was mandatory and that they had no discretion, did resolve to issue said bonds, but no action was taken thereon which conferred upon the creditors any vested rights, and at the first regular

meeting immediately thereafter on the first Monday in May, the board being then of opinion that the act merely "authorized and empowered" them to issue bonds, the order was revoked for reasons which they must have deemed good and sufficient, but which are unknown to us. The *mandamus* was improvidently granted.

Reversed.

WALKER, J. I concur in the conclusion of the Court in this case for the reasons stated in my opinion in *Bank v. Comrs.*, 135 N. C., 230.

CONNOR, J., dissenting. The only respect in which this case differs from *Bank v. Comrs.*, in which I have expressed my views, is that the plaintiff's claim consists of certain bonds, with the coupons representing accrued and past-due interest thereon, issued by the defendants pursuant to the provisions of the Act of 1887 and maturing 1907. It is recited in the preamble to the Act of 1903, and admitted in the record, that these bonds were issued for an indebtedness incurred for necessary expenses. The liability of the county of Madison for them because of the consideration is settled by this Court in *Smathers v. Comrs.*, 125 N. C., 480. It is contended that the Act of 1903 is invalid in so far as it directs the issuance of new bonds to run thirty years, carrying interest at five per cent., to redeem unmatured bonds. If I am correct in the conclusion reached in respect to the power of the General Assembly to direct the payment of county indebtedness incurred for *necessary expenses*, I cannot perceive why, if in its judgment the best interest of the State, in respect to that portion thereof set off for governmental purposes as Madison County, will be promoted by funding its debt, rapidly approaching maturity, and for which it is evident no other provision has been made at a lower rate of interest, it may not so direct. In the establishment

of the county, as pointed out by *Pearson, C. J.*, in *Mills v. Williams,* 33 N. C., 558, there is no contract—"no party of the second part." I do not care to repeat what I have said in *Bank v. Comrs.* The distinction between contracts of private persons or corporations and public agencies is clearly pointed out in *Railroad Co. v. Nebraska,* 175 U. S., 57. On Page 72 *Mr. Justice Shiras* says: "Usually where a contract not contrary to public policy has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. When, however, the respective parties are not private persons dealing with matters and things with which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes by legislative acts, and when the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the Legislature when exercised to protect the public safety, health and morals. That clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked." See also, *Williams v. Eggleston,* 170 U. S., 304. In *New Orleans v. Water Co.,* 142 U. S., 79, it is said that a corporation created for purposes of government is to be governed according to the law of the land, and may be controlled, its constitution altered and amended by the government in such manner as the public interests may require. "Such legislative interference cannot be said to impair the contract by which the corporation was formed, because there is in reality but one party to it, the trustees or governors of the corporation being merely the trustees for the public, the *cestuis que trust* of the founda-

tion." Mr. Tucker, discussing this question, says: "These charters are based upon no contract with the people, but created by the political authority for its convenience and for motives of public policy. The relation between the sovereignty and the municipality is not contractual, but is one of delegation by a principal to an agent." Tucker Com. on Const., 833. For a very able discussion of this subject, see *Sharswood, J.*, in *Philadelphia v. Fox*, 64 Pa. St., 169. When therefore the State established Madison County with its territorial limit, and conferred upon the inhabitants certain governmental powers, and imposed corresponding duties, it in no manner parted with its rights through the Legislature to exercise that constitutional governmental dominion and control which is essential to the carrying out of its general policy. It could not abrogate or ever put in abeyance this power, or the exercise of it, without to that extent parting with its sovereignty. This the State never can do in respect to any of its political agencies. They are always subject to legislative control. *Mial v. Ellington*, 134 N. C., 131. If the contention of the defendant is correct, and the State occupies the status towards the county which is contended for, it would be difficult to justify the appropriation of money from the public treasury to counties for the aid and support of public schools, the sending at the charge of the people of the State of convicts into counties for opening highways and other internal improvements. If each county may assert its own will in respect to assuming the burdens and providing for the costs imposed upon it as an integral part of the State by the General Assembly—as for instance, making provision for holding the courts at the appointed times, or having a jail, or providing or maintaining a home for the poor—it would be impossible to carry on our governmental system, the wisdom of which has been vindicated by long experience. As is said by *Merrimon, J.*, in *White v.*

Comrs., 90 N. C., 437, 47 Am. Rep., 534: "The leading and principal purpose in establishing them is to effectuate the political organization and civil administration of the State in respect to its general purposes and policy which requires local direction, supervision and control, such as matters of local finance, education, provision for the poor, the establishment and maintenance of highways and bridges, and, in a large measure, the administration of justice. They constitute a distinguishing feature in our free system of government." They have been termed "an involuntary civil division of the State created by statute to aid in the administration of the government."

An interesting and instructive discussion may be found in Smith Modern Law of Municipal Corporations, section 1, 65.

The Legislature finding the condition of Madison County in respect to its indebtedness such that some provision was necessary to enable it to meet its past-due interest and the approaching maturity of the principal, together with its floating debt, enacted the statute of 1903. No injustice is done the tax payers of the county. The interest at six per cent. on the bonds is overdue and compounding. The credit of the county must soon be seriously impaired. The course pursued is that which all prudent business men, corporations and governments adopt. The debt is funded at a lower rate of interest by a bond issue extending through the usual period for such bonds. An examination of our statutes for the past ten years will show that the rate of interest and time fixed for maturity are the same as that of a large majority of the county bond issues authorized. The acts passed at the session of 1903 providing bond issues for other counties are of the same character in these two respects, and include several of the wealthiest counties in the State. The creditors of course cannot be compelled to surrender a six per cent. bond maturing in 1907 for a five per cent. bond running

thirty years, but as they elect to do so it is difficult to see how any injustice is done the tax payers. It will be observed that the treasurer is not permitted to sell the bonds at less than par, and while the election is given the creditor to take the new bonds in exchange for the old ones, I cannot see why, if the bonds can be sold at more than par, he can complain if his bond be paid him in cash. I think that the judgment below should be affirmed.

I have not discussed the question presented in the record and briefs that the commissioners, having met and adopted a resolution directing the bonds to be issued, have no power to rescind this action, that the power in the nature of a trust once exercised was extinct. This view is not advanced as an estoppel. While from the view which I take of the case it is not necessary to decide the question, there is in my opinion much force in it.

MONTGOMERY, J., concurs in the dissenting opinion.

BANK v. COMMISSIONERS.

(Filed May 3, 1904).

For headnotes to this case, see *Jones v. Commissioners*, 135 N. C., 218.

ACTION by the Battery Park Bank against the Board of Commissioners of Madison County and others, heard by *Judge E. B. Jones*, at chambers, Asheville, N. C., November 20, 1903. From a judgment for the plaintiff the defendants appealed.

Frank Carter and *H. C. Chedester*, for the plaintiff.
T. S. Rollins and *Gudger & McElroy*, for the defendants.

CLARK, C. J. The facts in this case are substantially the same as in *Jones v. Comrs.*, 135 N. C., 218, the only difference being that the plaintiff here alleges that he holds $722 of the scrip issued by the county for necessary expenses and for which he wishes county bonds, and in *Jones v. Comrs.* the plaintiff held bonds which are not yet due but which he wished refunded in new bonds. Whatever distinction this may make in the rights of the plaintiff, if any, our decision in *Jones v. Comrs.* is not based upon such difference, but upon the fact that chapter 289, Laws 1903, is not mandatory, and places the issuance of bonds in the discretion of the Board of County Commissioners, who are merely "authorized and empowered" to make such issue.

For the reasons given in that case the judgment herein, which peremptorily orders bonds issued to the plaintiff, is likewise

Reversed.

CONNOR, J., dissenting. This is a controversy submitted without action under section 567 of The Code upon an agreed state of facts. The plaintiff is a corporation. The county of Madison is indebted to divers and sundry persons, including the plaintiff, in a sum aggregating $70,000 or thereabouts, as nearly as the parties can ascertain; said indebtedness consisting (1) of bonds of said county issued under and by virtue of chapter 398, Public Laws 1887, and not yet due, amounting to $25,000 or thereabouts; and (2) of the present floating debt of said county incurred for the necessary expenses thereof prior to January 1, 1903, all of which is past due and bears interest at the rate of six per cent. per annum, amounting to about $45,000—this last-named item including an indebtedness to the plaintiff of $722.93, as nearly as the parties can ascertain, of which sum $500 is principal and bears interest from the date thereof until paid, at the rate

of six per cent. per annum. (3) That the aforesaid debt and claim of the plaintiff against said county has been duly presented to and passed upon by the special board of audit created by section 7, chapter 289, Public Laws 1903, and by said board has been duly proved, declared and reported to be a valid subsisting obligation of said county and to be past due, and to have been contracted for the necessary expenses of said county prior to January 1, 1903. (4) That the General Assembly of North Carolina at its session of 1903 passed an act entitled "An act to liquidate and settle the outstanding indebtedness of Madison County, and to authorize the issue of a series of bonds for the purpose of paying off the floating debt, old bonds, etc., contracted for the necessary expenses of said county." (5) That at a special session held on April 20, 1903, the defendant Board of Commissioners made the following order, as the same appears on the minutes of said board: "Whereas the General Assembly of North Carolina for the year 1903 passed an act authorizing the Board of Commissioners of Madison County to issue bonds in an amount not exceeding $75,000 to pay off all the debt of said county contracted prior to the first day of January, 1903, for the necessary expenses of said county: Therefore be it resolved by the board that this county issue its bonds to an amount sufficient to pay off the said debt, not to exceed $75,000, and to issue the amount audited as found by the auditing board. It is further ordered that notice be issued to all creditors of said county to present their claims for audit before said board of audit, authorized by said act, on the 28th day of May, 1903, so that the same may be passed upon as required by said act; thirty days' notice to be given of the time and place of meeting of said board of audit." (6) That thereafter, to-wit, at their regular meeting in May, 1903, the said defendant Board of Commissioners made the following order, as the same appears on

the minutes of said board: "Ordered by the board that the order made at its called session of April 20, 1903, authorizing the issue of bonds, be and the same is hereby revoked; and it is further ordered that no bonds be issued under the recent bonding act passed by the last Legislature relative to Madison County." (7) That the plaintiff has demanded of the defendants that they issue the bonds authorized by the above-recited act of 1903, and place the same in the hands of the treasurer of said county, pursuant to the provisions of said act, which the said defendants have failed and refused to do.

The Court upon the foregoing state of facts ordered and adjudged that the defendant Board of Commissioners and W. L. George, chairman of said board, and V. B. Davis, Register of Deeds, execute and issue the bonds of said county authorized by the said act, in accordance with the terms and provisions of said Act of 1903, and that said bonds be delivered to the Treasurer of Madison County to be held and disposed of, and the proceeds thereof applied by him in the manner and for the purposes declared, defined and specified in the said act, and that a peremptory writ of *mandamus* be issued to that end. From this judgment the defendants appealed.

The preamble of chapter 290, Laws 1903, is as follows: "The General Assembly of North Carolina do enact: Whereas by an act of the General Assembly of North Carolina, Public Laws of 1887, chapter 398, hereinafter referred to, the Commissioners of Madison County were authorized to issue the bonds of the county not to exceed the sum of $25,000 bearing interest at six per cent. payable semi-annually, and in conformity with the said act the Board of Commissioners of Madison County issued the bonds of the said county, amounting in all to $21,000, with coupons attached; and whereas the said bonds are now an outstanding indebtedness against said county, and the said county will not be able

to pay the principal of the same at maturity; and whereas it is to the best interest of the tax payers of the said county that the said bonds shall be renewed, before their maturity, by refunding the same at a lower rate of interest than six per cent., and also that the present floating debt of the said county, incurred for the necessary expenses thereof prior to January 1, 1903, together with all accrued interest due at the date of payment or refunding, be liquidated and funded by issuing a new series of bonds to cover the same and to embrace the entire debt of said county incurred for the necessary expenses, as it existed on January 1, 1903, with the interest thereafter accruing." It is thereupon enacted that the Board of Commissioners "are hereby authorized and empowered to issue coupon bonds, etc.," that said bonds become payable on June 1, 1903, and to bear interest at the rate of five per cent., payable semi-annually, and that they be issued only to liquidate outstanding bonds and for the necessary expenses of said county incurred prior to January 1, 1903, with accumulated interest."

Provision is then made for the form of said bonds, and authority given to levy a special tax to pay the interest and principal when the same become due. By section 7 of said act a special board of audit it created to scrutinize, examine and adjust and report to the said board all bonds, claims and debts contracted by the said county prior to January 1, 1903, which are still outstanding, unsettled and unliquidated. Said board is required to report to the County Board of Commissioners all such claims, bonds, etc., as shall be audited and allowed by them. The findings of the board of audit are made conclusive in regard to the purpose for which the said bonds were issued or debt contracted. Section 9 of said act provides that immediately after its ratification, the chairman of the Board of Commissioners shall advertise in some newspaper published in the county of Madison, and

at the court-house door in said county, for thirty days, the place and time when and where the said board of audit shall sit, and require all persons holding debts against said county incurred prior to January 1, 1903, to present the same before said board of audit. The Board of Commissioners are authorized to retire all of the outstanding bonds issued under chapter 398, Public Laws 1887, with the interest due thereon at their par value, and pay off and discharge all of the outstanding indebtedness of the said county incurred for the necessary expenses thereof prior to January 1, 1903, as herein provided, by selling so many of the bonds issued under this act as may be necessary for such purpose, and by applying the proceeds thereof to the liquidation of such bonds so retired and of such debts. Said bonds shall sell for not less than their par value. It is made the duty of the Board of Commissioners to place the bonds, when issued, in the hands of the treasurer of the county, whose duty it shall be to sell the same and to place the proceeds as set out in the act. It is further provided that if any creditor of said county, whose debts or claims come within the meaning of this act, or any holder of any bonds of said county shall desire to exchange his bonds, coupons or other evidence of said indebtedness, it shall be the duty of said commissioners to pay off the said creditors and liquidate the said indebtedness in the bonds authorized by this act, exchanging said bonds at their par value and cancelling the evidences of indebtedness taken in lieu thereof. All of the bonds issued under this act shall be exempt from county and municipal taxation. Provision is then made for the special taxes provided for. It is further provided that if any officer of the county shall apply the proceeds of any bonds issued under this act, or exchange any such in any other manner or for any other purpose, or shall issue any more of the bonds than shall be necessary for the specific purposes of this act, or shall fail and refuse to per-

form the duties imposed upon him by the provisions of this act, he shall be guilty of a felony. By section 19 it is enacted that if the bonds are issued, the Board of Commissioners of the county shall not levy a specific tax, as authorized by section 8, chapter 322, Laws 1901, but shall levy a tax on property and polls to pay the interest on the bonds, etc.

After careful consideration and examination of this record and of the authorities cited by the counsel and my own investigation, I am constrained to differ from the majority of the Court in the conclusion reached by them. I would be content to express my dissent without saying more, but the reasoning upon which the judgment of the Court is based is so variant from my views, and, as I think, with all possible deference, from sound legal principles and authority, that it seems proper and becoming to set forth the result of my thoughts and investigation upon the very important questions involved. To my mind the principles underlying the decision of the case are of vital importance in the administration of our State and county government. My strong convictions upon the subject must be my excuse for encumbering the record with my dissent.

The questions presented by the record may be stated as follows:

1. Does chapter 289 of the Acts of 1903 impose upon the defendant Board of Commissioners the duty to issue the bonds and dispose of the proceeds, when sold, as directed by the terms of the statute?

2. If so, is it within the power of the Legislature to impose such duty and to make its performance mandatory?

3. Will the Court, by *mandamus*, compel the performance of such duty?

The plaintiff maintains that an affirmative answer should be given to each of these questions, and its claim for relief

is based upon this contention. That the questions may be considered free from complications, it will be well to keep in view the admitted and essential facts as they appear in the record. The indebtedness of Madison County, which is included in the provisions of the act, may for the purpose of this discussion be thus classified:

1. The bonds issued pursuant to the Act of 1887, maturing in 1907.

2. The accrued and past-due interest on said bonds.

3. The present floating debt incurred for the necessary expenses of said county prior to January 1, 1903, and past due.

The plaintiff's debt falls within the third class. It will be observed that by section 7 of the act a special board of audit is created, the members thereof named, and its duties prescribed. Neither the existence of this board nor its procedure is dependent upon any action of the defendant Board of Commissioners. On May 30, 1903, the special board, in strict compliance with the provisions of the statute, met and the plaintiff's claim, together with others, was "presented, proved and allowed." It was also ascertained and declared by the said board that the plaintiff's claim was "for the necessary expenses of the county incurred prior to January 1, 1903." The action of the board was duly reported to the defendant Board of Commissioners as prescribed by the act. Demand has been made by the plaintiff that the bonds be issued and other proceedings had as provided by the statute. Thus, we have fixed by admission of the defendant a valid indebtedness incurred for the necessary expenses of the county, etc.

Has the Legislature commanded the payment of this debt by the means prescribed by the statute, or has it left to the discretion of the commissioners the payment of the said debt in the manner directed? The defendant says that the lan-

guage of the statute is permissive, and not mandatory; that the words "*hereby authorized and empowered to issue the bonds*," etc., exclude the idea that it was the purpose of the Legislature to impose any duty or to require the issuance of the bonds, unless in the exercise of their discretion the defendant commissioners see fit to do so.

The principle by which the courts have been guided in construing statutes containing the terms used by the Legislature or other terms of similar import, was first announced in *Rex v. Barlow*, 2 Salk., 609, which the case states was an "indictment on 14 Car. 2, chapter 12, against church wardens and overseers for not making a rate to reimburse the constables. Exception was taken that the statute only puts it in their power to do so by the word *may*, but does not require the doing of it as a duty, for the omission of which they are punishable. *Sed non allocatur*, for where a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*: thus 23 Hen. VI. says the sheriff may take bail; this is construed he *shall*." This case has been cited as authority and the principle announced uniformly approved.

In *King v. Inhabitants of Derby* (Skinner, 370) the report of the case is as follows: "Moved to quash the indictment against divers inhabitants in Derby for refusing to meet and make a rate upon the several parishes in Derby to pay the contables tax; first because they are not compellable, but the statute only says that they *may*, so they have their election, and no coercion shall be; *non allocatur*, for *may* in the case of a public officer is tantamount to *shall*; and if he does not do it he shall be punished upon an information; and though he may be commanded by a writ, this is but in aggravation of his contempt."

In *Regina v. Tithe Commissioners*, 14 Q. B., 459, *Mr. Justice Coleridge*, construing an act conferring power on

the defendants, says: "The words undoubtedly are only empowering, but it has been so often decided as to become an axiom that in public statutes words only directory, permissory or enabling may have a compulsory force when the thing to be done is for the public benefit or in advancement of public justice."

"Permissive words in respect of courts or officers are imperative in those cases in which the public or *individuals* have a right that the power so conferred be exercised. Such words, when used in a statute, will be construed as mandatory for the purpose of sustaining and enforcing rights, but not for the purpose of creating a right or determining its character; they are peremptory when used to clothe a public officer with power to do an act which ought to be done for the sake of justice, or which concerns the public interest or *the rights of third persons.*" Southerland on Statutory Construction, 597.

The principle is thus stated in Endlich on Int. of Stats., section 311: "There is therefore abundant authority for the proposition that such powers as are here under consideration are invariably imperative; and that it is the duty of those to whom they are entrusted to exercise them whenever the occasion contemplated by the Legislature arises. And having regard to this implied duty, the enabling or *facultative* terms in which the power may be couched, much as 'it shall be lawful,' are to be regarded merely as the usual mode of giving a direction; as *importing* that it shall not be lawful to do otherwise than as directed."

McCrary, Circuit Judge, in *Ralston v. Crittenden*, 13 Fed. Rep., 508, thus states the rule of construction: "Even if the terms of a statute are permissive only, and mean no more than the words generally employed in statutes importing a grant of authority or power to a public officer to do a certain act, still it is well settled that all such acts are construed as

mandatory, whenever the public interests or *individual rights* call for the exercise of the power conferred."

In *Supervisors v. U. S.*, 17 Wall., 435, the language of the act was: "*May, if deemed advisable, levy a special tax, etc.*" *Swayne, J.*, says: "The counsel for the respondent insists with zeal and ability that the authority thus given involves no duty; that it depends for its exercise wholly upon the judgment of the supervisors, and that judicial action cannot control the discretion with which the statute has clothed them. We cannot concur in this view of the subject." The Judge cites the English cases and concludes: "These are the earliest and the leading cases upon the subject. They have been followed in numerous English and American adjudications. The rule they lay down is the settled law of both countries. * * * The conclusion to be adduced from the authorities is that where power is given to public officers, in the language of the act before us or in equivalent language—whenever the public interests or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demand of right and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid and who would otherwise be remediless. In all such cases it is held that the intent of a Legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.'"

In *Galena v. Amy*, 72 U. S., 705, the charter provided that the city council "*may*, if the said city council *believe* that the public good and best interest of the city require, annually collect a tax, etc., for the payment of the funded debt of the city, etc.," and the Court said that "this power has not been exercised by the city authorities, and they have made no

other provision for liquidating the debts due to the relator. They have no other means of payment in possession or prospect. * * * The rights of the creditor and the ends of justice demand that it should be exercised in favor of affirmative action and the *law requires it.* In such cases, the power is in the nature of a trust for his benefit, and it was the plain duty of the Court below to give him the remedy for which he asked, by awarding a peremptory writ to compel the imposition of the tax."

In *People v. Supervisors,* 51 N. Y., 401, the board of supervisors were "authorized and empowered" to hear and determine certain claims against the county and to provide for their payment. *Earle, J.,* says that "The first question to be determined is whether this act was merely permissive or mandatory to the board of supervisors. * * * This relief would be quite illusory if it were left to the absolute discretion of the board of supervisors of any county to refund the taxes or not, as they might see fit. * * * The purpose of the act, as well as the simplest justice, requires that we should hold that it is mandatory upon the respective boards of supervisors, unless there is something in the plain language used that forbids such a construction. The words 'authorized and empowered' are usually words of permission merely, and generally have that sense when used in contracts and private affairs; but when used in statutes they are frequently mandatory and imperative." After examining the cases, he says: "These authorities are abundant to show that the language used in the act under consideration must be construed to be imperative."

In *People v. Supervisors,* 68 N. Y., 114, the language of the statute was "that the said board *may in their discretion* cause the tax to be levied." The same learned Justice, speaking of the right of the creditor, says: "He has rendered a service for the public for which he expects to be paid, and for

which he ought to be paid, either by the town or the county. * * * Under such circumstances he goes to the Legislature, and it knowing, as we are bound to believe, the facts, passes an act for his relief. The relief might be quite illusory if it was intended to leave it to the debtors to say whether they would pay or not. No act was necessary to enable the supervisors to pay for this bridge if they were willing to. * * * Hence, it cannot be supposed that it was the intention of the Legislature simply to confer a permissive authority to do what they could do without the act, if willing. * * * Here was something directed to be done for the sake of justice, and in such a case the word 'may' is generally construed to mean 'shall.'" See also, *Sifford v. Morrison,* 63 Md., 14.

Smith, C. J., in *Johnston v. Pate,* 95 N. C., 68, says: "The term 'may' is often construed as mandatory when the statute is intended to give relief," citing *Rex v. Barlow, supra; Mason v. Fearson,* 9 How., U. S., 248, in which *Mr. Justice Woodbury* said: "Without going into more details, these cases fully sustain the doctrine that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do."

Upon the foregoing unbroken line of authorities which, if necessary, might be extended to almost every jurisdiction in the Union, it is clear that the language of this statute should be construed as mandatory. In the preamble of the act the conditions existing in respect to the indebtedness of Madison County are recited, which are admitted in this record to be true. We have a debt contracted for the necessary expenses of the county, which it was the duty of the defendant commissioners to pay. The payment of this debt was demanded by every possible consideration—public justice, the interests of the people of the county and the rights of the creditor

combine to demand relief. With all deference to the majority of the Court, I think no stronger case could be presented for the application of the principle which has been recognized as controlling the courts of England and America.

It must be conceded that the second question presented by the appeal is more difficult of solution. I cannot think that it should be answered by the suggestion that the power is not vested in the Legislature, for that "if the Legislature had this power a casual majority could practically confiscate all property in any county by directing the issue by counties named in the respective acts of large amounts of bonds and at an excessively high rate of interest, regardless of the wishes of the tax payers of such county." It is not necessary to cite authority to show that the Legislature has no power to compel or authorize a county to issue a single bond "regardless of the wishes of the tax payers," except for *necessary expenses*. *Smathers v. Comrs.*, 125 N. C., 480. What constitutes "necessary expenses" has been very clearly defined by this Court. It is not easy to perceive how, in the light of the constitutional restrictions as construed by this Court, the recognition of the power asserted in this act can bring about such disaster to the people. I most respectfully but firmly dissent from a canon of construction of the Constitution based upon the apprehension that the chosen representatives of the people of this State may not be trusted to discharge the duty imposed upon them by the Constitution, or be loyal to the trust reposed in them. We must look to the Constitution alone to find what powers are granted by the people to their agents. If the asserted power is granted, we may not, without doing violence to that instrument, prevent its exercise by indulging in grave apprehensions that it may be abused. The Courts may declare what power they have granted, but they will hold their agents responsible for the manner in which it is exercised.

The language of *Black, C. J.*, in *Sharett v. Mayor*, 21 Pa. St., 147, must commend itself to the heartiest approval: "The great powers given to the Legislature are liable to be abused. But this is inseparable from the nature of human institutions. The wisdom of man has never conceived of a government with power sufficient to answer its legitimate ends and at the same time incapable of mischief. No political system can be made so perfect that its rulers will always hold it to its true course. In the very best, a great deal must be trusted to the discretion of those who administer it. In ours the people have given large powers to the Legislature, and relied for faithful execution of them on the wisdom and honesty of that department and on the direct accountability of the members to their constituents. There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary. There is nothing more easy than to imagine a thousand tyrannical things which the Legislature may do if its members forget all their duties, disregard utterly the obligations they owe to their constituents, and recklessly determine to trample upon right and justice. * * * I am thoroughly convinced that the words of the Constitution furnish the only test to determine the validity of a statute, and that all arguments based on general principle outside of the Constitution must be addressed to the people, and not to us."

Mr. Justice Iredell, to whose wise foresight and clear conception of the principles of constitutional law and limitations we owe a debt of gratitude, said: "If a State Legislature shall pass a law within the general scope of their constitutional power, the Court cannot pronounce it to be void merely because it is in their judgment contrary to the principles of natural justice." In *Calder v. Bull,* 3 Dall., 386, *Judge Baldwin* said: "We may think the power conferred by the

Constitution of this State too great or dangerous to the rights of the people and that limitations are necessary, but we cannot fix them, * * * we cannot declare a legislative act void because it conflicts with our opinions of policy, expediency or justice. We are not the guardians of the rights of the people of the State, unless they are secured by some constitutional provision which comes within our judicial cognizance." *Bennett v. Boggs,* 1 Bald., 74.

Nash, C. J., in *Taylor v. Comrs.,* 55 N. C., 144, said: "Whether the Legislature acted wisely or not is a question with which we have nothing to do. The power being admitted, its abuse cannot affect it; that must be for the legislative consideration. It is sufficient that the judiciary claim to sit in judgment upon the constitutional power of the Legislature to act in a given case; it would be rank usurpation for us to inquire into the wisdom or propriety of the act." *Brodnax v. Groom,* 64 N. C., 244; *Harris v. Wright,* 121 N. C., 172.

In *Norwich v. Comrs.,* 15 Pick., 60, *Shaw, C. J.,* says: "It will not throw much light on a question like this to put extreme cases of the abuse of the power to test the existence of the power itself." *Pearson, C. J.,* in *Brodnax v. Groom, supra.*

Certainly neither of these great Judges can be suspected of entertaining views dangerous to the reserved rights of the people or sustaining the assertion of doubtful powers by either department of the government. While we should guard with jealous care the right of local self-government, and find no power to impose burdens by way of taxation or otherwise upon the people except when they have conferred it, we should at the same time be slow, save when our vision is clear, to set aside acts of the General Assembly. Again invoking the words of *Judge Black:* 'We can declare an act of Assembly void only when it violates the Constitution

clearly, palpably and plainly, and in such manner as to leave no doubt or hesitation on our minds."

If I were permitted to speak my mind regarding the policy, wisdom and justice of the act under consideration, I would find no difficulty in declaring that, upon the admitted facts in this record, the statute is wise, just and promotive of the best and highest interest of the people of Madison County.

Mr. Justice Montgomery, in *Smathers v. Comrs., supra,* says: "The county of Madison was indebted to various persons, the consideration being the necessary expenses of the county already incurred, and being unable to pay the same and at the same time to conduct the ordinary business affairs of the county with its resources, obtainable through the taxes up to the full constitutional limitation, etc." This was said upon a record coming to this Court in 1899 in regard to a part of the indebtedness referred to in the Act of 1903. The history of the struggle with the indebtedness by the people of the county, as appears from the records of this Court and the acts of the Legislature, shows that, unless in the way provided in this act they may care for their indebtedness and have time within which to pay it, the county will soon be bankrupt and unable to discharge its duties, powers and functions as a part of the government of the State. There is no suggestion that these debts may be paid from any other resources than taxation. That they must be paid is beyond controversy. But the answer to the question presented for our decision must be found in the Constitution of the State, and not by considerations of this character.

This Court by its *Chief Justice* said, in *Ewart v. Jones,* 116 N. C., 570: "Under our form of government the sovereign power resides with the people and is exercised by their representatives in the General Assembly. The only limitation upon this power is found in the organic law as declared by the delegates of the people in convention assembled from

time to time." What, under our system of administrative government, are the relations of the General Assembly to the several counties of the State, and to what extent may the former control the administration of the latter, are interesting questions. It will be well to avoid the use of the term "municipal corporation," because there exists important distinctions between towns, cities and villages, which come strictly within that term, and counties, which are sometimes called "*quasi* municipal corporations," but are, strictly speaking, neither. Dillon Mun. Corp., sections 22, 23; *Moffitt v. Asheville,* 103 N. C., 249, 14 Am. St. Rep., 810. The Constitution, Article VII, provides for the division and government of counties, etc., and section 14 confers upon the General Assembly the power by statute to modify, change or abrogate any and all of the provisions of the said article and substitute others in their places (except certain sections not affecting the question under discussion). The history of the State since 1876 shows that the General Assembly, at its first session after the ratification of the Constitution, did repeal each section (save the ones excepted) and substituted others essentially different. Acts 1876-7, chapter 141. Many other changes equally as radical have been made from time to time, and this Court has recognized the absolute power of the Legislature to do so. *Harris v. Wright, supra.* The Court said: "Thus was placed at the will and discretion of the Assembly, the political branch of the State government, the election of county officers, the duty of commissioners, the division of counties into districts, etc." The power of the Legislature to establish, change and abolish counties is declared by this Court in *Mills v. Williams,* 33 N. C., 558. *Pearson, J.,* speaking of different kinds of corporations, says: "The division of the State into counties is an instance of the former. There is no contract, no party of the second part, but the sovereign for the better government and manage-

ment of the whole chooses to make the division in the same way that a farmer divides his plantation off into fields and makes cross-fences when he chooses. The sovereign has the same right to change the limits of counties, etc."

This Court has always held that counties are not liable to an action for damages for injuries sustained by a defective bridge or other parts of a highway; whereas a city or town is liable to such action. The reason upon which this distinction is based is manifest. In *White v. Comrs.*, 90 N. C., 437, *Merrimon, J.*, discusses at length the relation which the counties bear to the State, and says: "They are subdivisions of its territory, embracing the people who inhabit the same, created by the sovereign authority and organized for political and civil purposes. They are created by the sovereign without any special regard for, or the solicitation, consent or desire of, the people who reside in them, etc." They are not liable to be sued unless the Legislature by statute gives a right of action. In *Manuel v. Comrs.*, 98 N. C., 9, it was held that in the absence of any statutory provision they were not liable to be sued for negligence of their servants or agents, as for damages sustained by one confined in the county jail. It is said that "counties are of and constitute a part of the State government. * * * They are in their general nature governmental—mere instrumentalities of government—and possess corporate powers adapted to their purposes." The distinction between the status and liability of towns and counties is illustrated in *Lewis v. Raleigh*, 77 N. C., 229.

In *Tate v. Comrs.*, 122 N. C., 812, this Court, discussing the authority and power of the General Assembly to command the commissioners of a county in respect to discharging the duties imposed as a part of the State government, said: "The defendants contend that the act is unconstitutional, (1) Because, while the Legislature may authorize and empower

the County Commissioners to levy the special tax for a special purpose, it cannot direct or order them to do so. This contention is unfounded. Counties are but agencies of the State government. * * * They are subject to legislative authority, which can direct them to do, as a duty, all such duties as they can empower them to do." See also, *Wallace v. Trustees,* 84 N. C., 164.

The question is exhaustively and ably discussed by *Brinkerhoff, J.,* in *Comrs. v. Mighels,* 7 Ohio St., 109. He says: "A municipal corporation proper is created mainly for the interest, advantage and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the State at large for the purposes of political organization and civil administration in matters of finance, of education, or provision for the poor, and especially for the administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State, and are in fact but a branch of the general administration of that policy."

It is undoubtedly competent for the Legislature to make the people of a county liable for the official delinquencies of the County Commissioners, and, if they think it wise and just, without any power in the people to control the acts of the commissioners or to exact indemnity from them." In *Dennis v. Maynard,* 15 Ill., 477, it is said that "The State does not allow itself to be sued, but it may hear, investigate and determine its own indebtedness and assume the debts to and from others, so it may direct the county authorities to ascertain and allow just claims upon the public treasury, or may ascertain and fix that amount and direct a raising of means by taxation for its payment. The public county and township funds are under legislative control. * * * These local municipal corporations are created for convenience

in the police arrangements, but their powers and duties remain subject to the legislative will through the legislative body." The identical question involved in this case came before the Supreme Court of Nebraska in *Commonwealth v. People,* 5 Neb., 127, in which it is said: "That Jefferson County is indebted to the relators for the amount of the warrants in question will not be controverted; and when such is the case there is no doubt of the power of the Legislature to require the county to issue its bonds for the amount of its indebtedness."

In *Locomotive Co. v. Emigrant Co.,* 164 U. S., 559, 576, *Mr. Justice Harlan* says: "The county of ..... is a mere political division of the State, created for the State's convenience and to aid in carrying out within a limited territory the policy of the State. Its local government can have no will contrary to the will of the State, and it is subject to the paramount authority of the State in respect as well of its acts as of its property and revenue held for public purposes. The State made it, and could in its discretion unmake it and administer such property through other instrumentalities." *Taney, C. J.,* in *Maryland v. Railroad Co.,* 44 U. S., 534, says: "The several counties are nothing more than certain portions of territory into which the State is divided for the more convenient exercise of the powers of government. They form together one political body in which the sovereignty resides."

"The revenues of the county are not the property of the county in the sense in which the revenues of a private corporation are, and the power of the Legislature to direct their application is plenary. The county being a public corporation, which exists only for public purposes connected with the administration of the State's government, it follows that such a corporation, and of course its revenues, are subject to the control of the Legislature." *New Orleans v. Water Co.,*

142 U. S., 79; Smith Mod. Law. Mun. Corporations, section 756.

"And speaking generally, it may be affirmed that in any case in which compulsory taxation is found necessary in order to compel a municipal corporation or political division of the State to perform properly and justly any of its duties as an agency in State government, or to fulfill any obligations legally or equitably resting upon it in consequence of any corporate action, the State has ample power to direct and levy such compulsory taxation, and the people to be taxed have no absolute right to a voice in determining whether it shall be levied through their representatives in the Legislature of the State." Cooley on Taxation (3 Ed.), 1303.

Without further extending this opinion, I have reached the following conclusions: The State government having assumed the discharge of certain well-defined administrative duties in regard to opening and keeping in repair public highways and bridges, providing for the indigent, the insane, and other objects of her care, the administration of public justice through the courts, the punishment of crime, etc., involving the erection of court-houses, jails and reformatories, has established, among other agencies for the better discharge of these duties and purposes of government, counties, and in a restricted sense chartered towns and cities and committed to them in the territory marked off the duty of administering for the State these and such other necessary duties as may be assigned to them.

For the purpose of enabling the State to discharge these governmental functions, the people in their Constitution have granted to the legislative department power to make all necessary laws, including the power to contract debts, levy taxes, etc., within, and controlled by, certain well-defined constitutional restrictions and limitations; that this power may be exercised, either through agents selected by the people of the entire State, or through agents selected by the

people within the territorial limits marked off and designated as counties; that these agencies are required, for the purpose of carrying out the general policy of the State, to provide the necessary means. In doing so they may contract debts for necessary expenses and, within the constitutional limit, pay the same out of the ordinary revenues. If they find it necessary to exceed such limit, they may, with the consent of the Legislature, levy taxes to pay debts contracted for such purposes. It seems to me that it is clearly within the power conferred upon the Legislature to impose upon the county officers, who are in a certain sense State officers, the duty of providing for the payment of the indebtedness contracted for necessary expenses, which is equivalent to saying expenses incurred in the discharge of their duties and powers in carrying out the general policy of the State and discharging its functions. If the Legislature may command the authorities to levy a special tax beyond the constitutional limit to pay such debts, I am at a loss to perceive why it may not command them, with the consent of the creditor, to make provision by issuing bonds with which to raise the money to pay them. If the Legislature may direct the Governor and Treasurer to issue the bonds of the State to pay the expenses of the penitentiary and asylums, both being State agencies, I cannot see why it may not, in the exercise of the power drawn from the same constitutional source, direct the counties to do so. With the policy or wisdom of the statute we have nothing to do. In *Edwards v. Comrs.*, 70 N. C., 571, *Reade, J.*, says: "But levying taxes is not the only way which the defendants have to meet the plaintiff's debt. A liberal construction of the statute upon which they rely enables them not only to give a creditor a bond for his debt, if he will take it and indulge the county, but if he will not take it, then to raise money by the issue of bonds, and with the money so raised to pay off the debt." The manner in

which the provision is to be made for paying the debt is entirely within the discretion of the Legislature. The people of the county are represented in an especial way by its own Senator and Representative, but as a part of the people of the entire State they are represented by all of the members. They must look to them to see that no harsh or unjust or oppressive burdens are put upon them. Within the orbit assigned them by the Constitution they may act without interference or question by us.

If I am correct in my conclusions upon the question, the answer to the third must be conceded. When a duty not involving the exercise of a discretion is imposed upon a public officer, the power and duty of the courts to compel the performance of such duty by *mandamus* is clear. The Legislature prescribes the remedy; the courts enforce it. The power of the Legislature to establish boards of audit and other appropriate agencies to ascertain the amount of the debt and the consideration upon which it is based is not questioned. To what extent the commissioners are bound by its conclusions and excluded from litigating in the courts is not presented in this case, and I express no opinion in regard to it. I expressly refrain from expressing any opinion as to the power of the Legislature to compel by a bond issue the payment of a county debt contracted for any other purpose than necessary expenses.

There are other questions presented upon an appeal before us in the case of *Jones v. Comrs.*, in regard to which I express no opinion here. My dissent is based upon the agreed facts in this record.

MONTGOMERY, J., concurs in the dissenting opinion.

WALKER, J., concurring. The conclusion reached by the Court in this case appears to me to be right. Whether under our system of government and the special provisions of the

Constitution relating to counties, the Legislature has the power to compel a county to issue bonds for an existing indebtedness, either for the purpose of liquidating and renewing it or of paying it, is a very interesting and important question. In solving it we should not rely too much upon the decisions in other States, as the solution may depend, to some extent at least, upon the laws of the particular State in the courts of which the question is presented, and also upon a general consideration of the powers of the Legislature under the State Constitution. We would not be safe in saying that it should be settled upon principles of general law applicable to such cases, without taking into account any local provisions of law or any peculiar constitution of our local system of government by which those general principles may be modified. In the view taken by me of the case, it will not be necessary to express an opinion as to the power of the Legislature to require a county to pay its existing indebtedness by issuing bonds or to exchange new bonds for those outstanding and not yet matured. It can be well seen how the exercise of such a power, if conceded, might work injustice, and by one of the elementary rules of construction an intention to exercise such a power, if injustice may ensue therefrom, should not be presumed, in the absence of a clear and explicit declaration to that effect, but on the contrary that meaning should be adopted which will avoid such a result. Black Int. of Laws, pages 87 and 100. Rules 41 and 46.

A careful reading of the act in question and a consideration of it, not in detached portions but in its entirety, convinces me that the Legislature intended to confer upon the commissioners merely a discretionary power, or, in other words, authority to issue the bonds if in the exercise of their judgment they found it best for the interests of the people to do so. Why construe the act as a command to the com-

missioners to issue the bonds when it had not been definitely determined, and could not well be, that the creditors would accept the new bonds or even accept payment in money in advance of the maturity of the bonds held by them, and when they were not bound to accept either. Is it not more reasonable to infer that the legislative purpose was to give the commissioners power to act in the premises as the situation might be presented to them and according to their best judgment. It would be strange indeed if the Legislature should peremptorily order bonds to be issued before it had been ascertained whether the commissioners would be able to execute the order. But the language of the act itself is sufficient to show that the Legislature did not intend its provisions to be mandatory. In the title of the act and in every section where power to issue bonds is given there is not a single word of command, but every expression used implies discretion, and in the concluding section, by the use of the words "if the bonds authorized by this act are issued," it clearly appears that a discretion was left to the commissioners, because there could be no such doubt or contingency as therein implied if they were required to issue them whether they thought it proper to do so or not. Those words cannot be considered as referring to the possibility of a refusal by the creditors to accept the bonds, for the commissioners are authorized in that event to sell the bonds and pay the matured indebtedness. Indeed, the provision is that all of the indebtedness, however evidenced, shall be paid with the proceeds of the sale of the bonds (section 10), the creditors having the option to take bonds instead of money (section 11), and if the creditor so elects, it is then made the duty of the commissioners to give him bonds at par to the amount of his claim and in liquidation thereof. There is another view of the act which supports the construction that by it the commissioners have the right to decide whether bonds should

be issued or not. In those sections which refer to the issuing of bonds the words simply confer power and authority, and the same may be said of the title of the act; whereas in the sections which provide for an exchange and settlement with the creditors after the bonds are issued, and which refer to the other duties to be performed under the act, the language is changed so that the directions to the commissioners become positive and peremptory. It does seem to me that if it was intended the provisions of the act should be mandatory, words more appropriate to express such an intention than those we find in the act would have been used. We derive little or no aid from decided cases in construing the act. We must examine the context in order to ascertain the meaning, and no two cases under the circumstances will be found to be alike. It is true the word "may" is sometimes construed as mandatory when something is directed to be done for the sake of justice, or when the public interests or individual rights call for the exercise of the power conferred, but it is conceded that "the words 'authorized and empowered' are usually words of permission merely," and neither the word "may" nor the words "authorized and empowered," nor any other equivalent term, will be construed as imperative if the context of the act shows that such was not the purpose. In the cases cited in support of the contrary view, the plaintiffs were attempting to enforce payment of their claims by a tax levy, and not by the issue of bonds, and to the relief sought by them they had an inherent right. It was really a part of the contract that the debts of the county should be paid in that way, and the legislation was merely in aid of the enforcement of this right. But creditors of this county have no right to receive bonds for their claims. That was no part of the contract. The law, when the original bonds were issued, provided how county debts should be paid—by taxation—and if the Legislature had provided that a tax "may" be levied

for the payment of the county's liabilities, the authorities cited would perhaps be applicable, and the courts could compel compliance with the requirements of the act within the limits of taxation fixed by the Constitution.

I do not think the cases relied on to show the plaintiff's right to a *mandamus* will be found to conflict with the conclusion we have reached, if they are considered with reference to their special facts and the particular relief demanded. The words quoted from the case of *People v. Supervisors,* 68 N. Y., 114, namely, "that the said board may in their discretion cause the tax to be levied," when read with what precedes them will be found to refer not to a discretion to levy the tax, but to a discretion given to the supervisors of the county to decide whether the tax should be paid by the county or by the two towns specially benefited by the construction of the bridge, and they decided that it should be paid by the two towns. There was nothing in the way of paying the assessment upon the towns by taxation, and it was held that they should be compelled by *mandamus* to levy the necessary tax, and, so far as the ultimate question decided is concerned, the other cases cited are like that one. The principle of those cases is familiar, but it does not seem to me to have any bearing on our case and should not affect the result. The reasons I have given are to my mind sufficient to support the conclusion of the Court, and it is not therefore deemed necessary to discuss the other questions argued before us.

It is fortunate that we have been able to reach a conclusion upon a consideration and construction of the act itself which saves to the people of the county the privilege of local self-government. It may be that the Legislature has the power to control directly the action of the county authorities, and I have no disposition at present to controvert the proposition, but the right of the people of the county to manage

their own affairs should not be abridged, except under the pressure of a plain and positive legal requirement and when no alternative in the law is admissible.

BERNHARDT v. RAILROAD CO.

(Filed May 3, 1904).

CARRIERS—*Demurrage—Contracts—Mistake.*

A consignee who entered into a contract for the transfer of cars to his own yard on a switch, and was fully apprised of charges to be made, and paid them, could not recover them as paid under protest, though at the time of making the contract he said that he would pay the charges under protest.

ACTION by J. M. Bernhardt against the Carolina and North-western Railroad Company, heard by *Judge T. J. Shaw,* at February Term, 1903, of the Superior Court of CALDWELL County. From a judgment for the defendant the plaintiff appealed.

Edmund Jones, for the plaintiff.

W. C. Newland, C. E. Childs and *J. H. Marion,* for the defendant.

MONTGOMERY, J. The plaintiff alleged in his complaint that he was a dealer in lumber in the town of Lenoir, and that from November, 1899, to August, 1902, he received on his lumber yard a large number of cars loaded with lumber which had been hauled over the road of the defendant, the Caldwell and Northern Railroad Company, to the terminus of its track at Lenoir and then delivered it to the defendant, the Carolina and North-western Railroad Company; that

the Carolina and North-western carried the cars a fourth of a mile over their track to the plaintiff's lumber yard, and for that service the plaintiff paid to the Carolina and North-western fifty cents per car, and in addition thereto the sum of twenty-five cents per car as demurrage for each and every day that such car remained unloaded, including the day next after and also the day of its arrival; that the plaintiff was compelled to pay, and did pay under protest, the demurrage on the cars for the next day succeeding the day of its arrival, and also after on the day of its arrival, amounting to $225. The plaintiff further alleged that the demand of the defendants and the compelling by them of the plaintiff to pay the $225 demurrage for fractions of days was tortious, wrongful and unwarranted by law, and ought to be refunded to the plaintiff.

The defendant the Carolina and North-western denies any knowledge of the number of cars delivered to the plaintiff, or that any amount was paid to them under protest for such service, and further avers that it had no concern with the matters and transactions set forth in the complaint except as the agent of the Caldwell and Northern Railroad Company in collecting the charges of that company for the time cars were held by and for the plaintiff at Lenoir, and that all such charges so collected of the plaintiff were for the use and benefit of the Caldwell and Northern, and were collected and paid over to that company under instructions of that company.

The defendant the Caldwell and Northern Railroad Company deny in its answer that the plaintiff ever paid any amount to the Carolina and North-western Railroad Company for the use and benefit of this defendant; and further averred that it had an agreement with the Carolina and North-western by which this defendant was to pay said company fifty cents per day for all box cars and twenty-five

cents per day for all flat cars handled by this defendant belonging to said company, and the Carolina and North-western was to pay this defendant the sum of fifty cents per day for all box cars and twenty-five cents per day for all flat cars handled by the said company belonging to this defendant; that this defendant never had any contract whatever with the plaintiff about delivering cars to his lumber yard, and has never delivered any cars to his yard; and that the plaintiff has never paid this defendant anything whatever for delivering cars to his yard.

At the trial, by consent, a jury trial was waived and the Court found the facts. Such of them as are necessary to the decision of the case will be stated:

The Carolina and North-western Railroad Company switched the cars over its own track to the switch track extending to the plaintiff's lumber yard and thence along said switch track to the plaintiff's lumber yard, for which the plaintiff paid that company fifty cents for each car so switched. The defendants entered into a contract in writing with each other with reference to the interchange of cars, by which platform cars were to be interchanged on the basis of twenty-five cents per day of twenty-four hours, or fraction thereof, no mileage to be charged in either instance. The Caldwell and Northern Railroad Company looked to the Carolina and North-western Railroad Company for the twenty-five cents per day for each day that the cars stayed on Bernhardt's siding, and that the Carolina and North-western Railroad Company would collect from Bernhardt accordingly. That agreement between the two companies was sent to and received by the plaintiff. Plaintiff wrote to the companies that the twenty-five cents per day for each day that the cars might be on his yard, Sundays not counted, would be satisfactory, or, in his own words, "I will pay for the day they are being unloaded, or as many days as I may

delay them by not unloading." In reply to that letter, and before the matters complained of had arisen, the plaintiff received a letter from the Superintendent of the Carolina and North-western Railroad Company in the following words:

"Dear Sir: Yours 4th inst. in reference to car interchange. When the C. & N. deliver you cars to us at Lenoir to go in your track, we will put them over there, and when you notify us, we will take them out and place them back on the C. & N. track, but the C. & N. people will charge us for these cars from the time they are delivered to you until they are placed back on their track, and we will have to look to you for the amount. If the failure to place them back promptly is due to any carelessness on our part, then it will be for you to show the fact, but as the C. & N. holds us responsible for these cars, we will have to hold you to whatever amount they hold us; as we are doing this business at accommodation price, we cannot afford to lose anything in it. As above stated I shall do what I can to move these cars for you, but there will sometimes be failures (such as delayed trains) to place your cars that we cannot be responsible for. In such cases we propose to give our work preference.

"Now if at any time you notify our road that these cars are ready to be moved out, and they are not, if you will notify me, I will endeavor to push them out, but I am not on the grounds and cannot undertake to lose anything by failures.

"I would advise that you ask for C. & N. W. cars to go on C. & N. track, when you want lumber from them to your yard in order that the cars when unloaded may be loaded by you out and save an extra switch, and relieve the possibility of not getting these cars back promptly after you unload them."

And in reply to that letter the plaintiff wrote that he would pay the twenty-five cents per day for cars required by it in

the letter, but would do so under protest, and that he would endeavor to have it repaid to him, as he did not consider it a just or reasonable charge. The plaintiff afterwards paid the amounts with full knowledge of all the terms and conditions existing between the two roads as to the charge on cars, and there was no agreement on the part of either of them to repay the same. The bills were made out by the Carolina and North-western against the plaintiff for the charges—the charges being for detention and embracing fractions of days. The Carolina and North-western collected of the plaintiff the amount of the charges ($225) and accounted to the Caldwell and Northern for the same, along with all other of the Caldwell and Northern cars that went over the Carolina and North-western road, as the plaintiff had requested the Caldwell and Northern to do. The plaintiff could have unloaded the cars at the station in Lenoir and hauled the lumber with wagons to his yard at a cost of fifty cents per car, but it was more convenient for him to have them switched to his yard by the Carolina and North-western. The charge was for a rental or car service charge.

From all the facts found in the case, it is clear that the charges made for the detention of the cars against the plaintiff were not the ordinary charges for demurrage, and the rules governing that subject do not apply. The plaintiff had ready facilities for the transportation of lumber from the terminus or depot of the Caldwell and Northern to his own yard by wagon and horses, but for his own convenience he made a contract with the defendant companies, fixing the amount which should be due on the detention of cars upon the switch leading to his yard. The contract seems to be clear and explicit. The plaintiff knew what it meant, that is, that the charge for each car should be twenty-five cents a day and twenty-five cents for each fraction of a day, and he protested against it before any charge had been incurred.

But, nevertheless, afterwards he availed himself of the contract because of its greater convenience to him. If there had been room for misunderstanding between the parties as to the meaning of the contract when it was entered into, that became an immaterial matter when afterwards the plaintiff, upon presentation of bills containing charges for fractions of days, paid the charges. This is not a case where one under peculiar conditions is compelled to pay an extortionate demand, such as would shock the conscience, unconscionable and unreasonable, or suffer great injury to his person or property if he does not yield. The plaintiff, according to the findings of fact, as we have seen, had other facilities for carrying his lumber to his yard at a reasonable cost, and he only chose the method he adopted because it was more convenient to him. There was no mistake here about the facts. They were all known, and if the plaintiff had reluctantly and under protest paid the charges, it was nevertheless his voluntary act and he cannot recover them back. *Devereux v. Ins. Co.*, 98 N. C., 6. Money voluntarily paid with a knowledge of all the facts cannot be recovered back, although there is no debt. *Comrs. v. Comrs.*, 75 N. C., 240; *Comrs. v. Setzer*, 70 N. C., 426. Nor if thus paid can it be recovered back, though paid in satisfaction of an unjust demand or one that had no validity. *Brummitt v. McGuire*, 107 N. C., 351. The Court gave judgment that plaintiff take nothing and that defendants recover their costs, and the same is affirmed.

Affirmed.

McGRAW v. RAILROAD CO.

(Filed May 3, 1904).

CARRIERS—*Passengers—Damages.*

A person who gets on a blind baggage car, though having a ticket, but not having told the conductor that he had it, and the conductor not having seen it, is not entitled to recover as a passenger for injuries received by being pulled off the train by the conductor.

CLARK, C. J., dissenting.

ACTION by Theodore McGraw and John S. White against the Southern Railway Company, heard by *Judge T. A. McNeill* and a jury, at March Term, 1904, of the Superior Court of MECKLENBURG County.

The plaintiff, together with one White, purchased a ticket from the defendant's agent at Charlotte entitling him to go to Huntersville. He and White, while the train was standing at the station, went across the street for the purpose of buying a melon. The train moving off they ran to catch it and got upon the platform of the first car they reached, being the "blind baggage" car. The train moved slowly until it reached the crossing of the Seaboard Air Line track, where it was required by law to stop. The conductor, finding the plaintiff and White on the platform, pulled them off.

The plaintiff alleges that he was a pasenger on the defendant's train, and that the conductor violently and wantonly assaulted him, whereby he was greatly injured. He sues to recover damages for his injuries. White also brought suit and the cases were consolidated.

The plaintiff having testified in regard to the purchase of the ticket and boarding the train, said: "After we crossed the crossing, Tom Rowland (the conductor) came through. I was on the side of the platform next to the door, and

White on the right side. When he came up, he said: 'Fall off.' I said 'I have got a ticket,' and he said 'you have like hell.' I had a ticket in my hand. He caught me by the left arm and jerked me off. The train was moving." He was corroborated by White. The defendant introduced the conductor, who testified: "There is a State law requiring all trains to stop at the crossing. My porter, as usual, went over to the engine to see if there were any tramps or people on the train who had no business. On this occasion we stopped as usual. The porter did not come back as usual and I thought there was something wrong. I jumped on the ground and ran around the mail car. I was on the back of the first-class car. When I got to the front end of the mail car the train had begun to move, and I saw these two men up there. About the time I got there the baggage-master stepped up on the other side. I told the men to come down; they did not get down, and in order to get them on the ground before the train got up too much speed I reached up and pulled them down and let them light on the ground. When I put the second one down, I caught on the back end of the same car. * * * I just caught hold of them and pulled them down. They did not resist. I had no conversation with them; did not see any ticket; did not suppose for a moment that they had any ticket or they would not be there, because it was not a place for passengers and they could not pass from that end of the car to the other. There is no doorway between the mail car and the baggage car. Passengers are not allowed to go through them at all." He was corroborated by the porter. It was also in evidence that the rule of the defendant company forbade passengers from riding on the platform.

The evidence in regard to the injury sustained by the plaintiff was contradictory. His Honor directed the jury to answer the first issue "Yes." The defendant excepted, and from a judgment for the plaintiff, the defendant appealed.

Montgomery & Crowell and *M. B. Stickley,* for the plaintiffs.

George F. Bason and *L. C. Caldwell,* for the defendant.

Connor, J. There are a number of exceptions in the record to the instructions given by the Court and to the refusal to give special instructions, all of which are duly assigned as error. We are of the opinion that the first exception should be sustained. His Honor charged the jury, as a conclusion of law, that upon all the evidence the plaintiff was a passenger on the defendant's train, meaning of course that he was such for the purpose of maintaining this action. If he was correct in this, the jury must, as a conclusion of law, have answered the second issue "Yes"—thus eliminating the question whether the conductor used excessive force from consideration, except upon the character and amount of damages which should be awarded the plaintiff.

For the purpose of disposing of this first exception, we must assume that the conductor's account of the transaction is correct. The instruction is necessarily based upon that assumption. When the relation of passenger is established by entry upon defendant's premises for the purpose of purchasing a ticket or taking passage on the defendant's train, or entry into the cars for such purpose, the relative rights and duties of the passenger and carrier are fixed and well settled. There is a presumption that a person who enters a passenger car, nothing appearing in his conduct to the contrary, is or intends to become a passenger. *Railroad v. Brooks,* 57 Pa. St., 339, 98 Am. Dec., 229. No such presumption arises when the entry is upon a baggage or mail car or upon any other portion of the train not assigned to passengers. Elliott on Railroads, section 1578, says: "The presumption may of course be rebutted, and it will not ordinarily arise when the person occupies a position on the train which passengers have

no right to occupy, or goes upon a train on which passengers are not carried." The general rule is that a person can take passage on such trains only, and only in such places, as the rules of the company provide that passengers shall be carried, and one who does not conform to such rules is ordinarily to be regarded as an intruder or trespasser, and an intruder or trespasser cannot impose upon a railroad company the high duty which a carrier owes to its passengers." *Ibid.*, section 1581. It was the duty of the plaintiff, when found upon the platform of the baggage car, to promptly inform the conductor that he had a ticket, so that he could be given an opportunity to go into the car provided for passengers. He says that he did so. The conductor says that he did not do so, that he said nothing about having a ticket, and that he (conductor) saw no ticket. The truth of the matter should have been ascertained by the jury. If the plaintiff's version of the transaction is true, he is entitled to maintain his action. If the conductor's version is correct, he is not entitled as a passenger to recover. If the jury should find the conductor's version to be true, the plaintiff could recover damages for his ejection only by showing that the conductor used excessive force. *Railroad v. Herring,* 47 N. J. Law, 137; 54 Am. Rep., 123; Fetter on Carriers, 359. His right to recover punitive damages, if he shows himself entitled to compensatory damages, depends upon well-settled principles. *Holmes v. Railroad,* 94 N. C., 319. There must be a

New Trial.

DOUGLAS, J., concurs in result only.

CLARK, C. J., dissenting. The plaintiffs testified that they bought tickets, went across the street, still on the defendant's premises, and bought a muskmelon, and the train starting, they ran and got upon the platform of the baggage car, and

the assistant ticket agent of the defendant testified that the "tickets were all right." There is no evidence whatever to contradict this, and his Honor in his charge said: "I understand that counsel for both sides do not substantially disagree as to the facts of the first issue ('were plaintiff's passengers?'); they say that this is a deduction of law from the whole of the cause, so upon the evidence I advise you that you answer the first issue 'Yes.'" The counsel do not appear to have corrected or objected to this statement of the Judge at the time, as they should have done if they did not assent thereto, nor could they have shown any contradiction in the evidence as to the first issue. Their exception, entered after the trial, is clearly to the conclusion of law that those facts made the plaintiffs passengers, but in this there is no merit. The defendant's brief expressly says: "The Court was asked to instruct the jury that the plaintiffs were not passengers in contemplation of law"—thus concurring in the uncontradicted testimony as to the purchase of the tickets, but going on to argue that, being on the platform, the plaintiffs were not in law entitled to be treated as passengers, and therefore that the Judge instructed the jury wrongly upon the first issue. In both briefs filed by the defendant it is stated that the plaintiffs bought tickets, and the argument is that the Judge charged wrongly on that issue because the plaintiffs were not in the car.

Whether, in the absence of this direct and uncontradicted evidence that the plaintiffs bought tickets, and the ticket agent's evidence that the tickets were "all right," there would be a presumption that the plaintiffs were or were not passengers because of their being on the platform and not in the car, is a difficult question, and one which does not arise on the first issue upon this evidencee. The tickets were conclusive evidence that they were passengers. The Code, section 1963. How far the company should be excused for the

conductor's mistake in jumping to the conclusion that the plaintiffs were not passengers because they were on the platform and not in the car, is a matter to be urged, and doubtless was urged, to the jury on the third issue as to the measure of damages. But such mistaken inference by the conductor did not and could not destroy the effect of the uncontradicted evidence that the plaintiff had bought and paid for and had "all-right tickets," and were in fact on the train, in consequence, as passengers. There could therefore be no error in the view taken by the Judge as to the first issue. The plaintiffs both say they showed the conductor their tickets. He denies this but does not say they did not have tickets, nor does he testify that he asked for their tickets before he pulled them off the train while it was in motion, as he himself testifies. This was a violation of The Code, section 1962, and also of the rule of the company, No. 442, which was in evidence.

The following citations are from the very excellent brief filed by the plaintiffs' counsel and are exactly in point: Section 1963 of The Code says that "on the due payment of freight or fare, legally authorized therefor," railroads "shall take, transport and discharge such passengers." As between the conductor and passenger and the right of the latter to travel, the ticket produced must be conclusive evidence. *Frederick v. Railroad,* 37 Mich., 342, 26 Am. Rep., 531; *Hufford v. Railroad,* 53 Mich., 118. In *Creed v. Railroad,* 86 Pa. St., 139, 27 Am. Rep., 693, the plaintiff was travelling on a passenger train and on a car "not intended for use of passengers," and in a suit for damages it was held that the plaintiff was *prima facie* a passenger, though violating the rules of the company. *Brooks v. Railroad,* 57 Pa. St., 346; Thompson Carriers of Passengers (1880), 51. Irregularity in boarding the train does not sever the relationship of carrier and passenger. *Smith v. Railroad,*

18 N. Y. Supp., 759. To get upon the platform of a baggage car does not sever the relationship nor subject the passenger to the assaults of the conductor. Neither the carrier nor its employees can assume that a person on any car of a passenger train is a trespasser, merely because he is not in one of the cars provided for and usually occupied by a passenger. *Railroad v. Williams* (Texas), 40 S. W., 350. In that case the plaintiff was on the front platform of a baggage car and had not paid his fare. In *Martin v. So. Ry. Co.* (this same defendant), 51 S. C., 150, quoting and approving Williams' case, it is decided that "when one having a ticket, and with the intention to ride as a passenger, goes upon the train upon which his ticket entitles him to ride as such, even if he board the train at an unusual time and at an unusual place, he is entitled to the rights of a passenger, at least to the extent of not being mistreated by the employees of the company." In *Compton v. Railroad*, 34 N. J. Law, 134, the plaintiff had a ferry ticket, but instead of passing through the small gate, which was for passengers, he entered the ferry through the large gate intended for horses and vehicles, and in doing so violated the rules of the company. For this offense he was seized by the collar and jerked from the railing and dragged from the boat, *not while the boat was moving, however. Chief Justice Beasley,* in writing the opinion of the Court, says: "This agent of the railroad company had no right to expel this plaintiff from the boat without first informing him of the existence of the regulation of the company; nor had he any right to touch his person without first notifying him that unless he left the boat he would resort to such extreme means to put him off. The facts stand thus: A passenger is told by a subordinate officer of a railroad company to get off a boat; the passenger replied, 'I will not, I have a ticket'; the reply is, 'It makes no difference, you must get off

here,' and without more ado, he is seized by the collar and in the presence of many onlookers he is ignominiously expelled. I do not see but all reasonable men must unite in condemnation of such precipitate violence and indignity." In order to make Compton's case exactly like the case at bar the boat should have started off and then the plaintiff seized and thrown into the water. The learned *Chief Justice* further says that "these agents of incorporated companies must be taught that *personal violence must not be used except as a last resort and after explicit notification.*"

WINSTON v. BEESON.

(Filed May 3, 1904).

LICENSES—*Lotteries—Taxation—Ordinances—Acts 1903, ch. 247, secs. 51, 76—The Code, sec. 3800—Trading Stamps.*

Under the charter of the city of Winston, dealers in trading stamps do not come within the provision of an ordinance taxing "gift enterprises."

ACTION by the City of Winston against E. E. Beeson, heard by *Judge W. R. Allen,* at February Term, 1904, of the Superior Court of FORSYTH County.

The defendant, The Sperry & Hutchinson Company, was tried in the Superior Court upon appeal from the mayor of Winston, who fined them $20 for issuing and selling to merchants what are known as trading stamps without obtaining a license so to do, contrary to the provisions of an ordinance of that city forbidding the sale of such stamps to merchants or manufacturers, or the use of the same by the latter, without having paid the license tax of fifty dollars imposed by the ordinance for the privilege; and the defendant Beeson was,

tried for issuing and selling trading stamps as manager and agent of his co-defendant, in violation of the said ordinance passed under the authority given in the charter of the city of Winston, section 65, subsection 11, which is as follows: "Each distiller of fruits or grains, each distiller or compounder of spirituous liquors, each gift enterprise or lottery, each railroad company having a depot or office in town, a license tax of not exceeding fifty dollars a year."

It is not claimed by the State that any other special authority has been given by the Legislature in the charter of Winston to impose a license tax of fifty dollars upon the defendants, except that contained in the above extract from the charter. Subsection 13 of section 66 of the charter provides "That the Board of Aldermen shall have the power to impose a license tax on any business carried on in the city of Winston not before enumerated herein, not to exceed ten dollars a year." Private Acts 1891, chapter 307, as amended by Acts 1899, chapter 103. No special reference is made in the verdict to the charter of the city as contained in the two chapters of the Acts of 1891 and 1899 above referred to, but it was admitted that the present charter is the one to be found in those two chapters, and counsel referred to the charter in the argument, and especially to the provisions of it which relate to taxation. We will therefore consider it as a part of the case.

It may be that as a section of the charter was put in evidence, we should consider the other sections without any agreement, but however that may be we hold that under the circumstances the charter as a whole is now before us.

The jurors returned a special verdict as follows:

That the Sperry & Hutchinson Company is a corporation organized under the laws of the State of New Jersey, and the defendant Ernest E. Beeson is the local agent and manager thereof located in the city of Winston, North Carolina.

That the said defendant Beeson for and on behalf of his company located a business in the city of Winston in the following manner:

That he first applied to the proper officers and paid the license fees prescribed by the Revenue Act for trading stamp companies, and duly received his license for doing business in the said county and State, and then applied to the city of Winston asking for a license, and offering to pay ten dollars as prescribed by the ordinances of the city for advertising businesses. Whereupon the city, through its officers, declined to grant said license for less than fifty dollars. Thereupon the defendants began business in the city of Winston. That said Beeson approached a good many merchants in various businesses in the city of Winston and entered into contracts with them to use what was known as a trading stamp. That he did, on October 30, 1903, enter into a contract with W. B. Hudson, which contract is hereto attached and made a part of this record, and marked "Exhibit No. 1." That in carrying out said contract with said Hudson, and with others, the defendants advertised in the newspapers the business of the said parties with whom it had contracted for one week, had books called "Directories" printed and circulated throughout the town in the various homes and business establishments in the city of Winston, which books contain the names of the various merchants with whom the defendant company had contracted; and containing an explanation of the business, and having blank leaves diagramed for the purpose of pasting thereon stamps, which said book is made a part of the record marked "Exhibit No. 2."

That the defendant company, in pursuance of this contract marked "Exhibit No. 1," promises and agrees to advertise the business of the parties with whom he contracts in various forms and ways, and to induce persons to go to the store of the said parties with whom it contracts and there

buy goods and make demand upon the merchants for trading stamps.

That the defendants sold to the said W. B. Hudson, and proposes to sell to all others, certain trading stamps, and delivered to the said Hudson one pad of trading stamps containing 990 trading stamps, which are small stamps about the size of a postage stamp, containing certain numbers and the name of the Sperry & Hutchinson Company, which stamps are exact in form as those which will be found pasted on the first blank leaf of "Exhibit No. 2." That these stamps are sold to the merchants for about one-half cent each, and it contracts that on demand of customers that the merchant will give, for every ten cents worth of goods which he sells for cash to said customers, one of said stamps. That the customer gathers said stamps in this way, and when he obtains, either through his own purchases or through the purchases of others, stamps to the number of 990, which are pasted in a book in form as hereto attached marked "Exhibit No. 2," he then goes to the store-house of the Sperry & Hutchinson Company, which is established in the city of Winston and managed by defendant Beeson, and there selects an article of merchandise. That said articles of merchandise consist of furniture, tableware and other articles of virtu, which are marked as, worth one book, worth two books, etc., meaning that 990 stamps aggregated and put in a book constitute one book, and entitles the holder thereof to get any article of his own selection in said store, which is valued and labeled for one book, and so on.

That the Sperry & Hutchinson Company purchase their goods and merchandise in large quantities and the managers of the various stores make requisition to the general house for goods as they are needed in the various establishments. That the said merchandise of the Sperry & Hutchinson Company are such articles as are usually found in stores of general

merchandise, and those labeled one book are approximately worth $4.50, those labeled two books, $9.00, etc., and will compare favorably in price with the retail prices of such articles in any other establishment in the city of Winston. That the defendants in circulating the Directory, which is marked "Exhibit No. 2," in order to induce persons to trade with the merchants using the trading stamps, paste on the first blank page of said Directory ten stamps, which are given by defendant company without consideration to the persons having the Directory. That these, and all other stamps issued by merchants, are redeemable by the Sperry & Hutchinson Company at its store in Winson, or at any of its various stores throughout this State or the United States as above stated.

That the defendant company has done business in the city of Raleigh for six months, and at this time 14-16 of the stamps issued by the merchants have been presented and redeemed by the defendant company. That no percentage is found of the number of lapsed stamps, or stamps which are not finally redeemed. That in North Carolina there are at this time store-houses of defendant company located and doing business, among others, in the cities of Raleigh, Greensboro, Durham and High Point. That there is no time limit to the redemption of said stamps. That they are transferable by those who have them, and are bound, under the contract, to be redeemed whenever presented in the number above set forth to any of the various houses of the Sperry & Hutchinson Company.

That the contracts of defendant company made in the city of Winston, with others as above set forth, are for a period of one year, except that the contract which defendant made with E. W. O'Hanlan was as follows: That it differs from the contract marked "Exhibit No. 1," in that the words "parties of the first and second parts mutually agree that

this agreement shall be and remain in force for one year from the date of the opening of the store aforesaid of the party of the first part" were stricken out of the contract, and it was agreed that the contract should continue at the option of either of the parties to said contract, and that the said defendants would not enter into a similar contract with any other drug store in Winston during the continuance of the contract with the said E. W. O'Hanlan.

That the defendant Beeson delivered stamps to W. B. Hudson, a grocery merchant in the city of Winston, and the said Hudson delivered said stamps to one of his customers according to the terms of the contract as above set forth. Defendant only redeems stamps when presented in a full book consisting of 990 stamps. The portion of the charter of Winston and the ordinance under which defendant was arrested appears in this record as a part of this verdict.

And the jurors say that they find the foregoing facts, and if upon said facts the defendant is guilty in law, they find him guilty, and if upon the foregoing facts the defendant is not guilty in law, they find him not guilty.

Upon this special verdict his Honor adjudged that the defendants were not guilty, from which the State and the city appealed.

Watson, Buxton & Watson, with *Robert D. Gilmer, Attorney-General*, for the plaintiff.

Glenn, Manly & Hendren and *W. B. Crisp*, for the defendants.

WALKER, J., after stating the case. It is provided by section 3800 of The Code that cities and towns may levy taxes for municipal purposes on all persons, privileges and subjects within the corporate limits, which are liable to taxation for State and county purposes. By the Revenue Act

of 1903, chapter 247, sections 51 and 76, a license tax of twenty dollars is imposed "on any gift enterprise or any person or establishment offering any article for sale and proposing to present a purchaser with a gift or prize as an inducement to purchase," and a license tax of fifty dollars in each county where the business is conducted is imposed "upon every person, firm or corporation who issues or sells to merchants or manufacturers any trading stamps or other devices to be redeemed by the person issuing or selling the same." The city of Winston could therefore have required the defendant corporation to pay a license tax of fifty dollars under section 3800 of The Code and section 76 of the Revenue Act, if it were not for the clause in its charter by which the tax on all subjects not otherwise specifically provided for is limited to ten dollars. It is not provided in section 3800 that cities and towns may lay taxes to the same amount as the State and counties can impose, but upon the same privileges and subjects as are taxed for State and county purposes. The amount of the tax is left to be determined by the charter of the particular city or town, and, if there is no restriction in the charter, then by ordinance; but whenever such a limitation upon the city or town to tax is inserted in its charter, the power to tax by ordinance or otherwise must be exercised within the limit thus fixed by the law. Municipal corporations can levy no taxes except such as are authorized by their charters, or, where the charters are silent, such as are otherwise authorized by law. *Winston v. Taylor*, 99 N. C., 240; *State v. Bean*, 91 N. C., 554; *Latta v. Williams*, 87 N. C., 126. All these cases relate to license or privilege taxes. As to taxes on property, see *Redmond v. Comrs.*, 106 N. C., 122, 7 L. R. A., 539. By these considerations and authorities we are brought to the conclusion that the city of Winston had no authority to lay a privilege or license tax upon the defendant company exceeding in amount ten dollars, which is

the maximum allowed by its charter, unless it has acquired the power to exact the payment of a higher tax by virtue of the provision of section 65, subsection 11, which authorizes it to impose on "each gift enterprise a license tax not exceeding fifty dollars for each year."

If the business as conducted by the defendant corporation in the city of Winston is a "gift enterprise," the tax was lawfully imposed, but if it is not such an enterprise the defendants were justified in refusing to pay the tax and the judgment below was right. In this contention between the parties, after a careful examination of the authorities and a consideration of the question involved we are with the defendants, as we think it must be conceded that unless the city had the power under the provision of the charter last mentioned it was without power to pass the ordinance under which this prosecution was instituted before the mayor, and we must hold that it had no such power under that provision.

In passing upon the question whether the business of the defendant company falls within the meaning of the term "gift enterprise," we must not confine ourselves solely to any definition of those words which is intended to convey to our minds the meaning they have acquired by mere popular use, nor should we give to those words simply a literal interpretation. We must go deeper than that and ascertain what was the real purpose and intention of the Legislature in using them, or, in other words, what is their legal meaning and import. We would fall short of a full and proper investigation of the question if we should be content with saying that the company's business is in a general sense an "enterprise" at which "gifts" are used as an inducement to attract purchasers to the stores of its customers or patrons, and therefore it must be "a gift enterprise." This would be "sticking in the bark." The words had a well-known and definite meaning in the law when the statutes we have mentioned

were passed, and by a well-settled rule of statutory construction they must have that meaning in any interpretation we may give to those statutes.

The law lexicographers define a "gift enterprise" as a scheme for the division and distribution of certain articles of property to be determined by chance among those who have taken shares in the scheme. Black's Law Dictionary, page 539; Bouvier's Law Dictionary, Vol. I, page 884; Anderson's Law Dictionary, page 488. In *Lohman v. State*, 81 Ind., 17, it was said, in approving the definition just given, that the words "gift enterprise," as thus understood, had attained such notoriety that the courts would take judicial notice of what is meant when they appear in legislative enactments. It has been said in some of the books and by several of the courts, that while the word "lottery" is not a technical term of the law, and to dispose of property of any kind by lottery is not an offense which has a recognized and established legal definition, and that the meaning of the word must be determined by reference to its popular sense and the mischief intended to be redressed by the statutes, yet when thus construed it indicates a scheme for the distribution of prizes and for the obtaining of money or goods by chance. The word "lottery" has been variously defined as a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or other articles, a distribution of prizes won by lot or chance, a kind of game of hazard, wherein several lots of goods or merchandise are deposited in prizes for the benefit of the fortunate, or a sort of gaming contract by which, for a valuable consideration, one may, by favor of the lot, obtain a prize of a value superior to the amount or value of that which he risks. *State v. Mumford*, 73 Mo., 659, 39 Am. Rep., 532; *State v. Clark*, 33 N. H., 334, 66 Am. Dec., 723. Tested by any one of these approved definitions, a lottery always involves the

element of chance, fortune or hazard. It is gaming, pure and simple.

This being established, let us see if it assists us in arriving at the meaning of the words "gift enterprise" as used in the charter of Winston. The rule of construction is that associated words explain and limit each other. When a word used in a statute is ambiguous or vague, its meaning may be made clear and specific by considering the company in which it is found and the meaning of the terms which are associated with it. This idea is expressed in the maxim *"nositur a sociis."* Black's Interpretation of Laws, 135; Sutherland Stat. Cons., section 262. We find, not only in the charter under consideration, but in other statutes of the State relating to revenue, that the words "gift enterprise" are used in close and intimate association with the word "lottery." In the Revenue Act, passed at the same session as the charter of Winston, it was provided (Acts 1891, chapter 323, section 15) that a tax should be laid on every gift enterprise or on any person or establishment offering any article for sale and proposing to present purchasers with any gift or prize as an inducement to purchase, and on any lottery, whether known as a beneficial association, gift concert, or otherwise, provided that the section should not be construed as giving license or as relieving such persons or establishments from any penalties incurred by a violation of the law. This provision has been retained, we believe, in every Revenue Act passed since that year. It would seem plain, from the connection in which the words are used, and also by the very use of the words themselves, that the Legislature intended to tax only those enterprises, schemes and offers of bargains which involve substantially the same sort of gambling upon chances as in any other kind of lottery, and which appealed to the disposition or propensity for engaging in hazards and chances with the hope that luck and good fortune may give

a good return for a small outlay. The provision refers to gifts or prizes, the precise nature of which are not known at the time, and to cases in which the element of uncertainty is always present. It is restricted therefore to the kind of enterprises which appeal to the gambling instinct.

The Legislature has not looked upon the business of the defendant company as a gift enterprise, for in the Revenue Acts of 1901 and 1902 it was not taxed as such, but was excluded from that class (section 61) and placed in a class by itself (section 76), and so taxed as to indicate that it was considered a perfectly legitimate and proper business. There is no saving in section 76 concerning criminal prosecution as there is in section 61.

A statute of similar import to the provision in this charter was held, in *Commonwealth v. Emerson,* 165 Mass., 146, to embrace such a scheme or offer of bargains into which chance entered as one of its elements, and by which persons are induced to buy what they do not want in the hope or expectation or upon the hazard of getting something else as a gratuity which it might turn out they did want, but the exact character of which they do not at the time know. It would be strange indeed that the Legislature should link two such terms together in many statutes without intending that they should have a kindred meaning, but intending on the contrary that they should be diversely construed. We prefer to conclude that the purpose was not to impose a tax upon a perfectly innocent and harmless business and to place it in the same class and category with lotteries, which have fallen under the ban of an enlightened public sentiment and under the condemnation of the law, but to tax such "enterprises" as partake of the nature of lotteries and hold out temptations and allurements to the unwary and credulous, or to those who are willing always to take chances on results in the hope of getting a great deal for a very little.

Having reached the conclusion that the words "gift enterprise" as used in the charter refer only to such a one as includes the element of chance, we must next inquire whether the business of the defendant company comes within the meaning of those words as thus construed. From the definitions we have already given of a lottery or scheme for the disposition or distribution of prizes or property by chance, it appears that three things must concur in order to constitute it: (1) There must be the purchase of a right; (2) the right must be a contingent one to receive something greater than that which is purchased; and (3) the contingent right must depend upon a lot or chance. We have not been able to discover any one of these elements in the plan devised by the defendant company for the conduct of its business. The right to have the stamps redeemed depends upon no contingency, chance or lot whatsoever; the person receiving the stamps upon the purchase of goods is not in any degree deprived of his choice or will. Indeed, by the contract he is given full and free exercise of his choice and will. The right of selection among the articles kept by the stamp company in its store is expressly given, and the stamp collector may choose the best or the most valuable or such a one as may be most useful to him or pleasing to his taste, as he may be minded. The articles are all publicly exhibited, and, before the purchases are made or the stamps collected, any person proposing to buy and to receive the stamps from the merchant has free access to the store, where he may see and examine the goods from which his selection may be made. There is therefore no uncertainty as to the nature, character or value of the premium, if we may so call it, with which the stamps will be redeemed. The fact that the stamps are redeemed at a place other than the one where they are issued certainly does not introduce into the scheme any element of chance. We can discern no practical differ-

ence between this arrangement of the parties and one by which the merchant agrees to discount his bills where cash is paid by his customer at the time of the purchase, and the giving of stamps redeemable at a store of another in goods to be selected by the holder, instead of an actual discount by the merchant, does not in law vary the case or change the real and substantial character of the transaction. The plan as outlined in the verdict seems to be one for advertising the merchant's business and his wares and enabling him to sell his goods for cash instead of on time. This it must be conceded is an advantage to him. It is also a benefit to the customer, who practically receives a discount and who will buy more cautiously and judiciously if he pays cash, and will spend only according to his means. The stamp company is undoubtedly benefited also by the sale of its goods and anything it may gain by the failure to present stamps for redemption. But where is there anything in the transaction from first to last that bears any likeness or resemblance to a lottery or an enterprise of chance? What declared policy of the State or the law forbids it? It was suggested that the gain to the stamp company by the failure to present stamps at the store for redemption in goods involved an element of chance. If this is so, the government and the banks are engaged in a prohibited business, for both benefit by the loss of bills and currency which they put in circulation. The same may be said of railroad companies who issue tickets which may not be used and never come back to them for redemption. Can it be correctly said that this is the result of chance? Many other similar instances might be mentioned, but it has never been supposed that the business in which such gains are made was, for that reason, unlawful. Nor does the fact that the defendant's business is novel make it unlawful or subject it to taxation.

We turn now to the books and find that the decisions of

the courts of other States are in perfect accord with the view we take of this matter.

The Court of Appeals of Virginia has recently considered the same question in *Young v. Commonwealth*. 45 S. E. Rep. (Va.), 327, in which the Court says: "We find nothing in the contract between Sperry & Hutchinson and the defendant, nor the transactions with customers in pursuance of such contract, that is not a legitimate exercise of one's right to prosecute his own business in his own way. As has already been said, it appears to be simply one of many devices fallen upon in these days of sharp competition between trades-people to attract customers or to induce those who have bought once to buy again, and in this respect is as *innocent as any other form of advertising.*" Substantially the same is said in *Ex-parte McKenna,* 126 Cal., 429: "It appears," says the Court, "to be simply a device to attract customers or to induce those who have bought once to buy again, and in this respect is *as innocent as any form of advertising.*" In *State v. Shugart,* 35 So. Rep. (Ala.), 28, the business of the defendant is thus described: "The scheme, if such it may be termed, was only a mode of advertising by those merchants who entered into it. The articles of property given away by the company of which the appellee was the manager was not by lot or chance, nor by way of distribution of prizes among share or ticket-holders in any chance scheme. We are quite clear that there was nothing in the transaction offensive to the statute against lotteries and gift enterprises." In *State v. Dalton,* 22 R. I., 77, 48 L. R. A., 775, 88 Am. St. Rep., 818, will be found an able and elaborate discussion of the question and an unanswerable argument sustaining the defendant's contention that there is no element of chance in its enterprise, if it may be so called. In that case the Court says: "In other words, the act recognizes the right of a person to give away an article of merchandise in connection with

and as an inducement to the making of a sale of some other article, but provides in effect that the giving of such article must be done by him directly and not through a third person. We fail to see that there is any substantial difference in principle between the two methods, or that either bears any resemblance to a lottery. The element of chance, which is the basal principle in every scheme in the nature of a lottery, is wholly wanting." See also, *People v. Dycker,* 72 App. Div. (N. Y.), 308; *Comrs. v. Emerson,* 165 Mass., 146; *Comrs. v. Sisson,* 178 Mass., 578; *People v. Gillson,* 109 N. Y., 389, 4 Am. St. Rep., 465; *Long v. State,* 74 Md., 565, 12 L. R. A., 425, 28 Am. St. Rep., 268. Several cases have been decided the same way in the lower courts of some of the other States. They involved the very question we have under consideration, but as they have not been reviewed by the courts of last resort we will not make further reference to them.

Since this opinion was prepared, we have read the case of *Lausburgh & Sperry v. Dist. of Columbia,* 11 App. Cases (D. C.), 512, which has been called to our attention. We do not think anything said in that case, which was necessary to its decision, conflicts with what we have herein decided. The only point in that case was whether the business of the defendants came within the meaning of a "gift enterprise," as defined by the statute of the District. This will appear from the following passage in the opinion of the Court: "Without the necessity of declaring that the acts proved in this case constitute the conduct of a lottery or gift enterprise, as those words are commonly understood, or even of finding that the element of chance operates intentionally and distinctively in the scheme of the trading stamp company, we think, nevertheless, that they come within the prohibition of the statute, which, as before said, furnishes its own definition of "gift enterprise." The defendant's counsel

also contended that the ordinance is not a legitimate exercise of the police power, is discriminating, prohibitory and unreasonable, and is unconstitutional and void. We need not consider this sweeping attack upon the validity of the ordinance, though it is supported by a very learned and able argument, for we have concluded that the business of the defendant as described in the special verdict does not come within the meaning of the term "gift enterprise" as used in the charter. The city of Winston being limited in the power to pass ordinances by its charter and the general law, was without the necessary authority to pass the ordinance upon which this prosecution is based. The Court properly adjudged upon the special verdict that the defendants are not guilty.

Affirmed.

WINSTON v. HUDSON.

(Filed May 3, 1904).

For headnote to this case, see *Winston v. Beeson* at this term.

ACTION by City of Winston and the State against W. B. Hudson, heard by *Judge W. R. Allen,* at February Term, 1904, of the Superior Court of FORSYTH County. From a judgment for the plaintiff, the defendant appealed.

Robert D. Gilmer, Attorney-General, and *Watson, Buxton & Watson,* for the plaintiff.

Glenn, Manly & Hendren and *W. B. Crisp,* for the defendant.

WALKER, J. We have decided in *State and City of Winston v. Beeson and Sperry & Hutchinson Company, ante,* that the city had no power or authority under the provisions of

its charter to pass the ordinance for a violation of which the defendant is prosecuted, because the term "gift enterprise," as used in the charter, did not embrace the business of The Sperry & Hutchinson Company, they being the only words in the charter, as was admitted by counsel for the State and the city, which could by any possible construction apply to the case.

This being the law as declared by the Court in that case, and the defendant Hudson being charged with a violation of the ordinance, in that as a merchant he received stamps from the stamp company and delivered them to one of his customers, who had bought goods from him, according to the terms of his contract with the company, it follows that in so doing he committed no criminal offense, and the Court upon the special verdict correctly adjudged him not guilty.

Affirmed.

MARKS v. COTTON MILLS.

(Filed May 3, 1904).

1. NEGLIGENCE—*Evidence—Master and Servant.*

In an action for injuries to a servant whose hand was caught in open cog-wheels, testimony that the cog-wheels should have been covered was incompetent.

2. NEGLIGENCE—*Evidence—Master and Servant.*

In an action for injuries to a servant whose hand was caught in open cog-wheels, evidence that he had seen one machine with such cogs boxed in is not competent.

ACTION by W. H. Marks against the Harriet Cotton Mills, heard by *Judge O. H. Allen* and a jury, at October Term, 1903, of the Superior Court of DURHAM County. From a judgment for the plaintiff, the defendant appealed.

Guthrie & Guthrie, for the plaintiff.
Winston & Bryant, for the defendant.

WALKER, J. The plaintiff brought this action to recover damages for injuries alleged to have been caused by the defendant's negligence. He alleges that the defendant employed him to operate one of the machines in its cotton mill, called a speeder, and that he was ordered by the boss or foreman to clean the machine while it was running; that the cog-wheels of the speeder were not boxed or cased as they should have been, and that owing to its condition it was dangerous to run the machine at a great speed, as was done by the defendant while the plaintiff was cleaning it, all of which was unknown to him, as he was an inexperienced hand and had not been warned of the danger or instructed how to avoid it. The excessive speed and the exposed condition of the cogs caused the plaintiff's hand to be caught in the wheels and severely injured.

In order to prove the unsafe condition of the machine, the plaintiff introduced as a witness Ola Woodlief, who was permitted to testify, notwithstanding the defendant's objection, that the cog-wheels should have been covered or encased. Similar testimony was permitted to be given by other witnesses. It is only necessary that we should consider the competency of this testimony, as our opinion in regard to it is adverse to the plaintiff who recovered the judgment below, and the other matters may not be presented at the next trial, if there is one. The defendant's motion to nonsuit, which was denied by the Court, and to which ruling exception was taken, presents a question which calls for a most careful consideration. As the facts may be varied if the case is tried again, we refrain from expressing any opinion upon that ruling, lest one or the other of the parties may be thereby prejudiced.

It may be stated as a rule, which is of course subject to exceptions, though this case is not within any of them, that a witness can testify only to facts, and it is left to the Court and the jury to draw inferences and conclusions and to form opinions from the facts to which the witness testifies. He should not be permitted to express his opinion upon the very questions to be determined by the jury under instructions from the Court. This case furnishes a striking illustration of the wisdom of the rule. If the witness is allowed to testify that the cog-wheels should have been covered, it will be seen that what he says is the full equivalent of an opinion that the defendant was guilty of negligence. It was in substance the same as if he had testified that the accident would not have occurred if the cogs had been encased, and that the defendant therefore did not do what under the circumstances it should have done. If this is not a substantial declaration by the witness that the defendant was negligent, it is barely one degree removed from it. The witness, in our judgment, was permitted to invade the province of the Court and the jury in thus testifying. A witness should state facts, the jury should find the facts, and the Court should declare and explain the law. The functions of the three within their several spheres are clearly defined and should always be kept separate and distinct. Whether the speeder was so constructed as that its operation was safe to the defendant's employees, was the very question upon which the parties were at issue and which the jury were impaneled to decide. The witness' opinion upon that question was incompetent and the plaintiff's objection to it should have been sustained. Authorities in support of this ruling are abundant. We need cite only a few of them: *Tillett v. Railroad*, 118 N. C., 1031; *Wolf v. Arthur*, 112 N. C., 691; *Smith v. Smith*, 117 N. C., 328; *Summerlin v. Railroad*, 133 N. C., 550; *Burwell v. Sneed*, 104 N. C., 118; *Cogdell v. Railroad*, 130 N.

C., 313; *Cogdell v. Railroad*, 132 N. C., 852; *Harley v. B. C. M. Co.*, 142 N. Y., 31.

The witness Robertson, who also testified that the machine "should have been boxed," was permitted in addition to say, after objection by the defendant, that "he had seen an intermediate frame with these cogs boxed up." This was also incompetent. The employer does not *guarantee* the safety of his employees. He is not bound to furnish them an absolutely safe place to work in, but is required simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best known machinery, implements and appliances, but only such as are reasonably fit and safe and as are in general use. He meets the requirements of the law if, in the selection of machinery and appliances, he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the employer liable, not a mere error of judgment. We believe this is substantially the rule which has been recognized as the correct one and recommended for our guide in all such cases. It measures accurately the duty of the employer and fixes the limit of his responsibility to his employees. *Harley v. B. C. M. Co., supra.* This Court has said that all machinery is to some extent dangerous, but the fact that it is dangerous does not of itself make the owner liable in damages. It is the negligence of the employer in not providing for his employees safe machinery and a reasonably safe place in which to work that renders him liable for any resulting injury to them, and this negligence consists in his failure to adopt and use all approved appliances which are in general use and necessary to the safety of the employees in the performance of their duties, and this rule applies, it is said, even as between carrier and passenger. *Witsell v. Railroad*, 120 N. C., 557; *Dorsett*

v. Mfg. Co., 131 N. C., 254. If the employer is required to adopt every new appliance as soon as it is known and approved, but before it has come into general use, it would involve upon him the duty, at his peril, of securing at once the latest and best of all appliances which, as also said by this Court, would be too great a burden to impose upon him, even though the safety of the employee would be thereby enhanced. *Witsell v. Railroad, supra.* The rule which calls for the care of the prudent man is in such cases the best and safest one for adoption. It is perfectly just to the employee and not unfair to his employer, and is but the outgrowth of the elementary principle that the employee, with certain statutory exceptions, assumes the ordinary risks and perils of the service in which he is engaged, but not the risk of his employer's negligence. When any injury to him results from one of the ordinary risks or perils of the service, it is the misfortune of the employee and he must bear the loss, it being *damnum absque injuria;* but the employer must take care that ordinary risks and perils of the employment are not increased by reason of any omission on his part to provide for the safety of his employees. To the extent that he fails in this plain duty, he must answer in damages to his employee for any injuries the latter may sustain which are proximately caused by his negligence.

The testimony of the witness that he "had seen a frame with the cogs boxed up" was admitted in violation of the rule we have just stated, as it was equivalent to saying that the defendant had not adopted the best appliances for safety, though there was no proof that they were in general use. The testimony as given was collateral to the issue. It is suggested that the plaintiff could not begin to prove the fact that the boxed machines are in general use unless this kind of testimony is admissible. This reason for admitting the testimony is more apparent than real, and we do not think

it is at all sound. A point presented in a case should not be decided as an abstract proposition, but with reference to the facts and actual state of the case. The question and answer were not excluded but admitted in this case, and there was no additional evidence offered by the plaintiff tending to show that cog wheels in mills, other than the one mentioned by the witness, are boxed. The plaintiff perhaps might have shown that boxes were in general use by proving that a number of mills used them, but this he did not attempt to do. He had the full benefit of the right to begin his proof, and did begin it, but failed to complete it. If the fact that the speeders are boxed in one mill is proof of the general usage to that effect, then the evidence was properly admitted. But can it be successfully contended that it is any evidence of such general usage? There can be but one answer to this question. General usage cannot be established by proof of isolated instances, and certainly not by one instance. It would be unsafe to test the degree of care required of the defendant by proof of what some other person may have done. The latter is not shown to be the ideally prudent man, whose care is the standard for our guidance and whose example may always be followed. Another reason suggested in support of the admissibility of this evidence would require the employer to guarantee the safety of his employee, as it is said he should box the speeder because there is less danger when the cogs are not exposed. This is a clear departure, we think, from the rule of responsibility in such cases. If the employer should be required to do everything necessary to free his machine from all danger to his employees, there would be no such thing as the assumption of risk, for there would be no risk to assume. The argument in behalf of the admissibility of the evidence that there is less danger in speeders which are boxed than in those which are not boxed, leads to the conclusion that all speeders

should be boxed, without regard to the degree of care required of the employer. Again, whether the general use of a certain device for the safety of employees can be proved by the testimony of different witnesses that it is used in a number of mills, as well as by that of one witness who can speak of his personal knowledge in regard to such general use, is quite a different question from the one we have in this case, which is whether it was proper to let the jury hear and consider evidence as to its use in only one mill. If the evidence was competent for the purpose of beginning the plaintiff's proof, when he failed to add to it evidence of a like kind as to other mills, the Court should have excluded what had already been admitted, for in any view, it could only be competent as evidence of one of a series of similar facts or as a first link in the chain of proof. The error in permitting the witnesses, against the defendant's objection, to testify as above set forth entitles the latter to another trial. It is not necessary that we should consider the other exceptions, as the questions they raise may not be presented if the case should again come before us.

New Trial.

DOUGLAS, J., concurring in result. I concur with the Court in the conclusion that, according to our decisions, which, I will frankly say, have in some instances gone too far, the defendant is entitled to a new trial on account of the admission of the witness' opinion that the cog wheels should be boxed. I do not concur in the opinion of the Court wherein it says that it was error to permit the witness to testify that he "had seen a frame with the cogs boxed up." The witness does not appear to have expressed any opinion as to the best appliance for safety, nor in fact as to any other matter. He merely stated a simple fact which was material to the case. How else could the plaintiff begin to prove that boxed cogs

were in general use except by witnesses who had seen them in other mills. Even experts could not prove that they were in general use unless they knew the fact of their own knowledge. Whether boxes are the best method of protecting cogs may be a question of expert opinion, but whether they are in general use is a fact to which any one can testify. It is not necessary to prove it by any one witness, as it is difficult and frequently impossible to find any one man who has been through a sufficient number of mills to know the general custom. On the other hand, one witness may testify as to certain mills and other witnesses as to other mills. It cannot be held that the testimony of a witness is incompetent, simply because he does not testify as to a sufficient number of mills, because in that event the first witness would always be incompetent, and so all the witnesses would be excluded in turn. Moreover, the fact of general use is not the exclusive test, nor can a box be called a new and untried device. The true test is the question what a man of ordinary prudence, having due regard for the rights and safety of his fellow-men, would do under similar circumstances. Suppose that cog-wheels, placed in a position of constant danger to passers by, could be conveniently covered at small expense and without materially interfering with their efficiency, would it not be the duty of the owner to have them covered? The fact that a witness saw cog-wheels boxed in another mill would be admissible as *tending* to show that they could be boxed, and that they were boxed in other mills of a similar kind. What weight the jury would give to the evidence is another question and one entirely for them. Whether cogs in a given position can be boxed without interfering with their efficiency may require some experience to determine; but surely it does not require any expert knowledge for a man to know that there is less danger from machinery when it is boxed up so that he cannot possibly get into it, than there

is if it is left open so that he may get into it. There is certainly less danger of falling out of a window when the blinds are closed and securely fastened than when they are open. I see no error in the admission of that part of the testimony.

CLARK, C. J., concurs in the concurring opinion.

GILLIS v. ARRINGDALE.

(Filed May 3, 1904).

1. CANCELLATION OF INSTRUMENTS—*Deeds—Fraud—Damages.*

In an action to cancel a deed for the fraud of the grantee, the grantor in this case is entitled to such damages as the grantee might have done to the land.

2. CANCELLATION OF INSTRUMENTS—*Deeds—Damages—Improvements.*

In an action for the cancellation of a deed, the grantee is entitled to reduce the damage to the land by the enhanced value of the same from improvements placed thereon.

3. CANCELLATION OF INSTRUMENTS—*Issues—Damages—Consideration.*

In this suit for the cancellation of a convéyance and for damages, an issue as to what consideration defendant agreed to pay for the land was properly submitted.

4. CANCELLATION OF INSTRUMENTS—*Pleadings—Verdict—Reformation of Instruments—Deeds—Consideration.*

Where the complaint alleges and the verdict finds that the consideration in a deed was, by fraud or mistake, less than the amount agreed upon, the judgment should be for the reformation and not the cancellation of the deed.

GILLIS *v.* ARRINGDALE.

5. CANCELLATION OF INSTRUMENTS—*Pleadings—Amendments—Verdict—Reformation of Instruments.*

Where a verdict finds that the grantor was induced by fraud to execute a deed, the trial judge should permit the complaint to be so amended as to conform to the verdict, as on the allegations and verdict the equity of the grantor was one for reformation and not for cancellation, though the action was brought for cancellation of the deed.

6. DEEDS—*Reformation of Instruments—Consideration—Corroborative Evidence.*

In an action for the reformation of a deed as to the consideration, the value of the land and what the grantor would have sold it for at the time of the execution of the deed is competent in corroboration of the evidence of the grantor as to the consideration.

7. REFORMATION OF INSTRUMENTS—*Compromise and Settlement—Consideration.*

In an action for the reformation of a deed as to the consideration the grantor is not bound to accept a proposition to compromise not in accordance with his claim.

8. REFORMATION OF INSTRUMENTS—*Consideration.*

In an action for the reformation of a deed, one of the plaintiffs could not compel the defendant to take a share of the premises acquired by foreclosure at the price expressed in the deed.

9. REFORMATION OF INSTRUMENTS—*Consideration.*

In an action to reform a deed, if defendant elects to take a certain share of the premises he would be required to pay one of the plaintiffs, who claimed such share through title paramount to the defendant's, at a price based on the consideration expressed after reformation.

ACTION by R. H. Gillis and others against John A. Arringdale, heard by *Judge O. H. Allen* and a jury, at August Term, 1903, of the Superior Court of PERSON County. From a judgment for the plaintiffs both parties appealed.

GILLIS *v.* ARRINGDALE.

Kitchin & Carlton, for the plaintiffs.

Roundtree & Carr and *Manning & Foushee*, for the defendant.

PLAINTIFFS' APPEAL.

CONNOR, J. The plaintiffs alleged that prior to the first day of May, 1900, they owned the tract of land in controversy as tenants in common, and that prior to said day the said land had been partitioned between them; that the portion of it allotted to the plaintiff J. J. Gillis had been mortgaged to T. C. Brooks; that during the month of May, 1900, the plaintiffs agreed with the defendant, through his agent, in consideration of $150 to give him a ten-year option to buy the minerals on said land at the price of $3,000; that sometime thereafter the said agent, in whom the plaintiffs had great confidence, procured their signatures to a paper-writing upon the representation that it correctly set out the terms of said contract, the agent paying to each of the plaintiffs the sum of $25; that relying upon the representation of the agent they signed the said paper-writing; that by such representation the agent prevented the plaintiffs from reading the paper; that the plaintiffs always thought said paper set forth the true contract price until the month of May, 1901, when the defendant offered to settle with them by paying the sum of $500 for the minerals on the entire tract of land, instead of the true contract price of $3,000, being $500 to each of them, which the plaintiffs refused to accept; that upon examining the paper-writing, which had been recorded in the office of the Register of Deeds of Person County, they discovered that it was not the contract or option as they had been led to believe, but on the contrary it was a deed conveying said mineral interest for the sum of $500. The said deed contains the following clause: "That the said parties of the first part, for and in consideration of the sum of $150, the receipt whereof is fully acknowledged, have bargained, sold

and conveyed, and by these presents do bargain, sell and convey unto the said party of the second part, his heirs and assigns, all the mineral rights, metals and minerals to be found in, on or under the tract of land in Holloway's Township, Person County, North Carolina, as described as follows." (Here follows a description of the land.) The said paper-writing also contains the following clause:

"It is further understood between the parties to this deed that said John A. Arringdale or his heirs and assigns shall commence to develop said mines by searching and prospecting for the same within six months from the date hereof, and he shall have ten years within which to search for, prospect for and open up any mine or mines on said land, and after making search for and opening up the same, if the said John A. Arringdale shall find any mine or mines that he will care to operate, then he shall pay to the parties of the first part, or their authorized agent, or deposit in the Bank of Virgilina, which shall constitute a lawful tender, the additional sum of $500 to their credit, after having notified the parties of the first part that he intends to operate the same."

The plaintiffs further allege that the defendants went into possession of the land and cut and destroyed a large quantity of timber; they demand judgment, first, that the deed be declared void and cancelled; second, for three thousand dollars damages.

The defendant admits that he procured from the plaintiffs an option for the sum of $150 and that he was represented in the negotiation by his agent. He further says that the terms of the option were correctly set forth in the deed, and denies that any fraud was practiced upon the plaintiffs by his agent. He also denies each and every allegation of fraud or misrepresentation as to the terms of the deed, and admits that he went into possession of the land and says he spent many thousand dollars in prospecting for minerals and

putting up machinery on the land; that all of the improvements were put on it by the defendant before the plaintiffs made any claim or allegation that there was any mistake in the deed or any fraud practiced upon them. The cause came on for trial at August Term, 1902, before *Judge McNeill*, when the issues submitted to the jury were as follows: "1. Was the execution of the deed obtained from the plaintiffs by the fraud and misrepresentation of C. S. Garner, as alleged in the complaint? 2. If so, were the plaintiffs damaged thereby? (To both of these issues the jury responded in the affirmative.) 3. What is the value of the improvements placed upon the land by the defendant for mining the same? The jury responded '$4,000.'" His Honor set aside the verdict upon the second and third issues and made an order retaining the cause for further proceedings. The defendant excepted and entered notice of appeal, but being of opinion that such appeal was premature, it was by consent dismissed.

The cause came on again for trial before *Judge Allen* at August Term, 1903, when the following issue was submitted to the jury: "What was the true consideration agreed upon between the plaintiffs and the defendant for the mineral rights and privileges conveyed? Answer. '$3,000.'" The plaintiffs thereupon tendered a judgment upon the verdict, adjudging that "upon consideration of the verdict and of the admissions of the defendant * * * and allegations of the plaintiffs, the plaintiffs recover of the defendant the sum of $3,000 with interest, etc., and that said judgment be declared a lien on the land. His Honor refused to sign the judgment, endorsing the following entry thereon: "This judgment tendered by the plaintiffs and refused on the ground that the action is not one for a judgment on the debt, and that if it remains unpaid the plaintiffs have their remedy by an independent action at law." The plaintiffs excepted.

The plaintiffs then moved to so amend the complaint that it would conform to the judgment. His Honor refused the amendment and signed the judgment set out in the record. Said judgment directs the correction of the deed by striking out the words "five hundred dollars" and inserting in lieu thereof "three thousand dollars." The plaintiffs appealed.

The prayer for judgment indicates that the plaintiffs were not entirely clear as to the relief which they desired. They seemed to have conceived themselves entitled to have the deed cancelled and be remitted to their original status. They would in this view of the case have been entitled to judgment for such damages as the defendant may have done to the land by cutting and removing the timber, etc., not to the purchase price. They could not have the land and the price of it.

If the defendant had conceded, upon the finding of the jury, that the plaintiffs were entitled to have the deed cancelled, he would have been entitled to set up, by way of reducing the plaintiffs' damages, such improvements as he had placed upon the land to the extent, not of the cost to him, but of the enhanced value of the land. The defendant, however, does not offer to surrender the land and permit the cancellation of the deed, for the very obvious reason that he has expended large sums of money in prospecting for minerals and in putting up machinery on the land. He could not, in the light of the verdict of the jury, take the land for his improvements. His Honor, *Judge McNeill*, for this reason set the verdict aside in regard to the value of the improvements. We think that his Honor *Judge Allen* submitted the proper issue. Upon the coming in of the verdict the plaintiffs were entitled to have the deed corrected.

The only question therefore presented upon the plaintiffs' appeal is whether the Judge should, after making the correction, have proceeded to render judgment for the purchase price as fixed by the jury. He was of opinion that because

the action did not contemplate this result, the plaintiffs were not entitled to such relief.

We are of opinion that the conclusion reached in the trial is entirely consistent with the allegations in the complaint; that upon the allegations and the verdict the plaintiffs' equity was for reformation and not cancellation. It being the purpose of The Code system to avoid a multiplicity of suits and afford complete relief in one action, the courts should be liberal in allowing amendments with this end in view, especially so in respect to the prayer for judgment. It has been uniformly held that judgment should be rendered in accordance with the facts alleged and proved, without regard to the prayer.

While we hesitate to question the wisdom of the learned and careful Judge who tried this cause in refusing to permit the amendment upon such terms and conditions as upon the whole case he thought proper, we are not able to see from the record before us any good reason why the amendment, if necessary, should not have been allowed and an end put to the litigation. It has been frequently held by this Court that the plaintiff may in one action have relief upon equitable and legal rights. *Ely v. Early,* 94 N. C., 1.

In regard to the share of J. J. Gillis, it appears by the admission of both parties that, prior to the execution of the deed in controversy, he had executed a mortgage to T. C. Brooks, which was duly recorded; that said Brooks, on the first day of October, 1900, sold the land pursuant to the power contained in the mortgage, and it was purchased by A. S. Gillis, to whom he executed a deed which was recorded on November 25, 1900. In June, 1901, J. J. Gillis received notice from the defendant that he had paid $500 into the bank of Virgilina, whereupon he, the said Gillis, collected his part thereof ($83.33) and signed a receipt in full for his share of the money due on the sale. The plaintiff A. S.

Gillis insists that he is entitled to stand in the place of J. J. Gillis and receive the $500, and that the receipt by him of the $83.33 does not affect his rights. As the plaintiff A. S. Gillis claims title paramount to the defendant, of course his title is in no manner affected by the action of the plaintiff J. J. Gillis. He does not acquire the right to compel the defendant to take the J. J. Gillis share at $500. If, however, the defendant elects to take such share under his contract, he would pay the $500 to the plaintiff A. S. Gillis. This would seem to be the rights of the parties upon the facts herein stated. The defendant should exercise his election at or before the next term of the Superior Court of Person County, at which term judgment should be entered in accordance with this opinion.

Error.

DEFENDANT'S APPEAL.

CONNOR, J. In the defendant's appeal in this cause we find no error in the trial before *Judge McNeill*. Upon the trial before *Judge Allen*, the plaintiff R. H. Gillis was introduced as a witness and testified in regard to the terms of the option and the execution of the contract as set out in the plaintiffs' appeal. He was asked the following question: "At the time when you made this contract, what, in your opinion, was the fair and reasonable value of the minerals on this tract of land of 465 acres, if that was the size of it?" Answer. "Three thousand dollars; I never would have agreed to anything else." The defendant objected to the question and answer, and, upon his objection being overruled, excepted. He was asked the further question, "At what price had you and the other owners of this property—the minerals I mean—held the same for some time?" Answer. "Three thousand dollars." The defendant objected and, upon his objection being overruled, excepted.

We find no error in his Honor's ruling in this respect. The testimony was competent for the purpose of corroborating the plaintiffs' contention that the price agreed to be paid was $3,000, and not $500. The defendant tendered in writing to the plaintiffs, before the trial of the case, a proposition to compromise, and in open court tendered the plaintiffs the money in accordance with said proposition. The plaintiffs declined to accept it, and his Honor held that it was not a compliance with the rights of the plaintiffs as set forth in the pleadings, to which the defendant excepted. We concur with his Honor's ruling in this respect. The plaintiffs were under no obligation to accept the proposition to compromise. They were entitled to stand upon their rights under the contract.

Upon a review of the entire record we find no error, and the judgment must be

Affirmed.

TRUST CO. v. BENBOW.

(Filed May 3, 1904).

1. DOCUMENTARY EVIDENCE — *Evidence—Supplementary Proceedings—Waiver—Exceptions and Objections.*

Where a plaintiff introduced in evidence the entire record in supplementary proceedings, it thereby waived its exception to the previous exclusion of parts of such record objected to as being fragmentary.

2. DOCUMENTARY EVIDENCE—*Evidence—Competency.*

The fact that a letter was dictated by one member of a firm and the firm name signed by the other member of the firm does not sufficiently identify it to make it admissible in evidence.

3. DOCUMENTARY EVIDENCE—*Evidence—Competency.*

A letter by a third person giving the substance of a conversation with the defendant is not competent evidence as against the defendant.

4. NEGOTIABLE INSTRUMENTS—*Consideration—Husband and Wife—Dower.*

The release of a dower by a wife is a valuable consideration for a note executed by her husband to her.

5. FRAUDULENT CONVEYANCES—*Negotiable Instruments—Consideration—Questions for Jury—Husband and Wife.*

Whether the consideration for a note transferred by a husband to his wife was adequate, was a question of fact for the jury and could not be considered on appeal.

CLARK, C. J., and MONTGOMERY, J., dissenting.

On petition for rehearing. For former opinion, see 131 N. C., 413.

J. T. Morehead and *King & Kimball*, for the petitioners.
L. M. Scott, E. K. Bryan, Rountree & Carr and *Jno. N. Wilson*, in opposition.

DOUGLAS, J. This case is now before us on a petition to rehear. After the most careful consideration we are forced to the opinion that the petition should be allowed and the judgment of the Court below affirmed, as we find no substantial error in the record. We do not think it necessary to discuss any exceptions other than those decided in the former opinion. (131 N. C., 413). The plaintiff offered to read in evidence certain parts of the testimony of D. W. C. Benbow and of the statement of Mrs. Mary E. Benbow given in supplementary proceedings. Upon objection by the defendants, this testimony was excluded by the Court as being fragmentary. The plaintiff then, reserving his exceptions, introduced in evidence the entire record in the supplementary proceedings. Even if the evidence as originally offered had been competent, and therefore improperly excluded, a question we do not find it necessary to decide, the plaintiff waived

his right of exception by introducing the entire record, which of course included the part previously offered. If he wished to take advantage of his exception, he should have relied upon it and not have sought the inconsistent benefits of having his evidence before the jury and the right to a new trial on account of its previous exclusion if it failed of its desired effect. In other words, he should not have the benefit of both its exclusion and admission at the same time. This point has been expressly decided in *Cheek v. Lumber Co.*, 134 N. C., 225. We see no essential difference between such a case and the effect of introducing testimony after a demurrer to the evidence had been overruled, which is held to be a waiver of the exception. In both cases substantial justice seems to require that a party should either rely on his exception or abandon it. This was the rule in both the State and Federal courts before the passage of the so-called Hinsdale Act (Laws 1897, chapter 109, amended by Laws, 1899, chapter 131) and rests equally upon reason and authority. *Purnell v. Railroad,* 122 N. C., 832; *Cox v. Railroad,* 123 N. C., 604; *Gates v. Max,* 125 N. C., 139; *Railway v. Daniels,* 152 U. S., 684; *Runkle v. Burnham*, 153 U. S., 216.

Another exception of the plaintiff was to the exclusion of certain letters written by R. R. King to certain of Benbow's creditors. King testified that he had no recollection of writing the letters nor of anything therein contained, and that the letters did not refresh his memory in the slightest degree. After examining the letters, all that he was willing to say was that one of them was in his handwriting, and the others, typewritten and signed by Mr. Kimball in the name of the firm, were probably dictated by him, as he had personal charge of those matters of litigation. He further testified, in substance, in answer to repeated questions, that he always tried to tell the truth, and that he would not have stated in

those letters anything that at the time he did not believe to be true.

In no view of the case could any of the letters, other than that in King's handwriting, be competent against any of the defendants. They are typewritten and signed by Kimball. King *thinks* he dictated them, but has no recollection of doing so. Even if that fact were established, there is no evidence that the letters were correctly transcribed or that they were ever seen by King after they were written. The fact that they were not signed by him would tend to show that they were written and mailed in his absence. If he had read them over, he would probably have signed them. We do not think there was such identification of the papers themselves as is absolutely essential for their introduction under any circumstances.

Mr. King's autograph letter is sufficiently identified as the original paper, but we think that it is otherwise incompetent. It does not profess to give Dr. Benbow's exact language, nor in fact does it repeat the conversation at all. It does not pretend to contain the entire conversation between Mr. King and Dr. Benbow, or any substantial part thereof, but simply states in the writer's own language as the result of their conversation that Dr. Benbow said he wanted to pay certain notes, and to have them sent to Greensboro for that purpose. Mr. King testified that he had a great many conversations with Dr. Benbow, and it is evident that these letters were never intended to contain a record of the numerous conversations, but merely to state such isolated parts thereof or conclusions therefrom as were necessary to the immediate correspondence. This clearly takes the letters out of the rule laid down in 1 Greenleaf, section 439, *a* and *b*, even if we were inclined to carry the principle to the full extent covered by the wording of the section. The author cites but three cases from this State, *Green v. Cawthorn*, 15 N. C., 409;

State v. Lyon, 89 N. C., 568; and *Bryan v. Moring,* 94 N. C., 687. The first case involved no writing whatever, but merely held that "where A communicated to B a statement made to him by C, and upon his examination could not recollect its substance, C is a competent witness to prove it." There each witness testified to his personal recollection. In Lyon's case the witness was permitted to examine an alleged libelous article in a newspaper, not to prove the truth of its contents, but to refresh his recollection as to whether he had seen it. In that case the Court says, on page 571: "It is not necessary that the mind should be able to recall the distinct facts, when the witness has such assurance of them as enables him to testify. Among the classes into which Mr. Greenleaf distributed this species of evidence, is one in which the witness fails to recognize the writing, nor does it awaken his memory; yet, knowing the writing to be genuine, his mind is so convinced as to be enabled thereby to swear positively to the fact." (Citing 1 Greenleaf Ev., section 437). In turning to the section of Greenleaf then relied upon by the Court, we find that it is omitted by his progressive editor from the latest edition of the work that bears his name, and relegated to the appendix as being out of date. What Professor Greenleaf himself said is as follows: "Where the writing in question neither is recognized by the witness as one which he remembers to have before seen, nor awakens his memory to the recollection of anything contained in it, but, nevertheless, knowing the writing to be genuine, his mind is so *convinced* that he is on that ground *enabled to swear positively as to the fact.*" The italics are ours, and we are compelled to say do not seem to us to mirror the condition of the witness' mind upon the letters in question.

In *Bryan v. Moring,* the witness, referring to the paper offered in evidence, which was the testimony taken down by him in the *ex-parte* probate of the will before the Clerk, testi-

fied that: "I was requested by the Clerk to take down the testimony, and did so by consent of counsel. I took down the substance of the evidence of J. E. Bryan, and this paper contains everything of importance testified to by him, omitting repetition merely, and is in the main correct. It contains the substance of his evidence accurately." In that case the evidence was taken down for the express purpose of preserving it, and the writer testified that it contained accurately the substance of *all* that was said. It was admitted as impeaching testimony.

In *State v. Pierce,* 91 N. C., 606, the written papers, offered only as impeaching evidence, were the written examinations of the impeached witness before the coroner and committing magistrate, both of whom fully identified the papers. *State v. Jordan,* 110 N. C., 491, also referred to the written examination of a witness taken down by the committing magistrate and offered at the trial to impeach the witness.

In *Bank v. Fidelity Co.,* 128 N. C., 366, 83 Am. St. Rep., 682, the question is thus stated in the opinion of the Court on page 369: "The first assignment of error cannot be sustained. The admitted paper was a memorandum of the examination of the defendant Mehegan before a committee of the board of directors of the plaintiff bank and taken down by the witness Davis, who testified as follows: "Mehegan was present before the committee; he was examined; his examination was put in writing. I read every sentence to Mehegan as Mr. Fountain propounded the question; *then I wrote down Mehegan's answer.* I read the questions and answers as they were made, and he said that they were correct. *The entire paper is in my hand-writing.* Then read the whole over to Mehegan. He never refused to sign, never was asked to sign it." Under such circumstances, we think the paper was admissible as part of the testimony of Davis, with whose credibility, of course, its own was involved. This

case comes nearer to that at bar than any other of which we are aware, but its bare statement shows its essential points of difference. It contained *all* of Mehegan's testimony which was reduced to writing for the purpose of preservation, while the witness by whom it was proved clearly remembered the transaction and testified to its attendant circumstances. Moreover, Mehegan was not only a party to the action, but was the principal on the bond upon which the action was brought, against whom lay the primary right of recovery with the right of exoneration in his co-defendant. None of these conditions exist in the case at bar. While Dr. Benbow was perhaps a proper party, the only substantial recovery is sought against Charles D. Benbow personally and as executor of his mother. Against him, under the circumstances of this case, we do not think that the admissions of Dr. Benbow would be competent, even if properly shown.

One very serious, if not insurmountable, objection to the admission of any writing of which the witness has no recollection whatever, and which does not at all refresh his memory, is that it deprives the adverse party of all benefit of his legal right of cross-examination. The right to ask questions is worthless without the power to elicit answers. Where the witness remembers nothing the paper itself becomes the witness, and is protected by its inanimate nature from the utmost skill of the cross-examiner. Cross-examination, while frequently used to discredit a witness, is by no means confined to that purpose. Indeed, its general as well as most useful purpose is to bring out the statements and circumstances attending and qualifying the evidence in chief, the force of which is in this way frequently destroyed without attacking the credibility of the witness. This Court has said in *Howe v. Rea*, 75 N. C., 326, that evidence should be "authenticated by the two great tests of truth, an oath and a cross-examination."

The remaining question is whether there is any evidence of a valuable consideration for the transfer of the Fisher note from Dr. Benbow to his wife. He testifies that he transferred it to her as part payment on his note for $15,000 then held by her. This involves the question whether there was any valuable consideration for the latter note. Aside from the validity of a gift by one who has no debts, and the meritorious consideration of a promise to repay to a faithful wife the money her father gave her, which is not before us, we think that the release of her right of dower involved in signing the mortgages for fifty thousand dollars was a valuable consideration. Upon a careful reconsideration of the case we think that there is evidence tending to prove that Mrs. Benbow signed the mortgages in consideration of her husband's promise of a home. Aside from her verified answer in the record introduced by the plaintiff, a reasonable construction of her statement, viewed in the light most favorable to her, *tends* to prove the fact.

As there is no question as to the admissibility of the evidence, all that we can pass on is its probative *tendency*, its probative *force* being for the consideration of the jury alone. It is well settled that the inchoate right of dower is a valuable right, possessing the elements of property, and that its relinquishment constitutes a valuable consideration. 10 Am. & Eng. Ency. (2 Ed.), 142, 2 Kerr on Real Property, section 914; 2 Scribner on Dower, pages 7, 8.

In *Bullard v. Briggs*, 7 Pick., 533, 19 Am. Dec., 296, "A husband mortgages his land, and in consideration of his wife's releasing her right of dower to the mortgagee conveys the equity of redemption to a stranger in fee for the benefit of the wife, but by a deed containing no declaration of the trust and purporting to be for the consideration of a sum of money paid by the grantee: *Held*, as against creditors of the husband, that the relinquishment of the right of dower

was a valid consideration for the conveyance of the equity of redemption; that parol evidence was admissible to show that it was the true consideration; that if the transaction was honest and the right of dower equivalent in value to the equity of redemption the conveyance was valid.'

In that case the Court says, on page 538: "The consideration for this intended settlement on the wife was her right of dower in the estate which the husband was about to mortgage. Without her relinquishment he could not raise the money wanted for his support and his debts. His days were numbered by intemperance and disease. Though she had no actual estate in the dower during the life of her husband, yet she had an interest and a right of which she could not be divested but by her consent or crime, or her dying before her husband. It was a valuable interest, which is frequently the subject of contract and bargain; it was an interest which the law recognizes as the subject of conveyance by fine in England, and by deed with us. It is more or less valuable according to the relative ages, constitutions and habits of the husband and wife. It is more than a possibility, and may well be denominated a contingent interest."

In *Wheeler v. Kirtland,* 27 N. J. Eq., 534, the Court says, on page 535: "The character of inchoate dower has been the subject of much contrariety of opinion. It is said not to be an estate. It is not the subject of grant. It cannot be taken upon execution. Equity will not apply it to the satisfaction of the debts of the wife. As dower was a humane provision for the sustenance of the widow and younger children, some limit was imposed on the power to defeat its consummation. Yet, while not technically an estate, it cannot, at this day, be denied that inchoate dower is a valuable interest in land. It is an interest which the courts have repeatedly recognized. Its presence works a breach of the covenants against encumbrances. *Carter v.*

Denman, 3 Zab., 260. Its relinquishment is a valuable consideration to support a conveyance by her husband to her against his creditors (*Wright v. Stanard,* 2 Brock., 311); or a promissory note given by a purchaser. *Nims v. Bigelow,* 45 N. H., 343."

In *Farwell v. Johnston,* 34 Mich., 342, the Court says, on page 344: "The objection, for want of consideration, is without foundation. It has always been held that a release by a wife of an interest which was within her own option to release or not—as, for example, a right of dower—is a valuable consideration, which will support a post-nuptial settlement, and therefore will suffice for any other purpose. This is elementary law, and was never disputed."

In *Gwathmey v. Pearce,* 74 N. C., 398, the entire opinion of this Court is as follows: "Where a wife conveys her separate property to secure a debt of her husband's, the relation which she sustains to the transaction is that of surety." *Purvis v. Carstarphen,* 73 N. C., 575.

Here the wife joined her husband in the conveyance of his land in trust to pay his debt, in which land she had, under our dower statute, a vested right to dower, to be allotted after her husband's death; and she joined in the deed for the purpose of binding her dower. After her husband's death the whole land, her dower included, was sold under the trust deed to pay the debt. This made the wife a creditor of her husband's estate to the amount of the value of her dower in the land. This is the only point in this case. And it was rightly decided by his Honor.

In *Gore v. Townsend,* 105 N. C., 228, 8 L. R. A., 443, this Court, in a learned and elaborate opinion by *Justice Avery,* held that a wife's inchoate right of dower has a present value as property, and that when she encumbers it by joining with her husband in a mortgage to secure his debt

she becomes his surety, and as such is entitled to exoneration.

It is urged here that Dr. Benbow's note for $15,000 represented an amount greatly in excess of the value of Mrs. Benbow's right of dower in the lands covered by the mortgages signed by her. This may be true, but we have neither the right nor the means to find such a fact. All that we can say is that there was competent evidence tending to prove a *valuable* consideration. Whether the consideration was *adequate* was a question of fact for the determination of the jury. In this connection we can perhaps do no better than to quote the words of *Chief Justice Marshall*, in *Wright v. Standard*, 2 Brock., 311, 315, as follows: "The first is the difference between the value of the dower which has been relinquished and the property which has been settled in compensation for that dower. The Court has already said that this difference, if the conveyance be made with a real intent to pass the property, does not of itself vitiate the deed in a court of law. If the value of the dower had been a few dollars or cents less than the value of the property conveyed in satisfaction of it, no person would suppose the deed to be a nullity on that account. And if a small difference of value would not avoid it, what is the difference that will? Where does the law stop? The difference may be so great as to satisfy the conscience of the jury that the convenience is intended to cover the property from the just claims of creditors; but as a mere question of law I can find nothing in the books which will justify a court in saying that a deed, otherwise unexceptionable, is void because the consideration is of less value than the property conveyed."

Our attenton has not been called to any evidence as to the value of the mortgaged property, and there is no such legal presumption. As a matter of experience we all know that the loan rarely exceeds two-thirds of the value of the

security, and is generally much less. If in the case at bar the inequality were so great as to suggest the element of fraud, it should have been presented to the jury in the Court below; but cannot be considered here in the face of their verdict.

In the absence of substantial error in the trial below, we have come to the conclusion that the petition must be allowed and the judgment affirmed.

Petition allowed.

MONTGOMERY, J., dissenting. I dissent in this case from the opinion of the Court, but do not deem it necessary to write anything further than to refer to the opinion of the Court written by me in the case as reported in 131 N. C., 413.

CLARK, C. J., concurs in the dissenting opinion.

HINTON v. INSURANCE CO.

(Filed May 3, 1904).

1. SERVICE OF PROCESS—*Insurance—Acts 1899, chs. 54, 62.*

Service of process on the state insurance commissioner is valid although the insurance company has not domesticated.

2. INSURANCE—*Evidence—Fraud.*

In an action on a policy of insurance it is competent to show that the policy was procured by fraudulent statements as to the health of the insured; that the premiums were not paid by the insured; that the party paying the premiums and for whose benefit the policy was issued had no insurable interest in the insured, and that the assignment of the policy was made without the knowledge or consent of the insurer.

3. INSURANCE—*Premiums—Beneficiaries.*

Where it was agreed at the time application for a life policy was made that a person having no insurable interest in the life of the insured should pay all the premiums and receive the proceeds of the policy, it was void.

4. INSURANCE—*Executors and Administrators.*

Where the assignee of an insurance policy could not recover on account of having no insurable interest in the insured, for whom he had paid the premiums, he cannot, as the administrator of the insured, recover the amount of the policy for the purpose of carrying out the original agreement that the insurance was to be for his benefit.

5. EVIDENCE—*Insurance—Contracts.*

Evidence that a policy of insurance was not purchased for the benefit of the insured, and that the insured did not pay the premiums, is not incompetent as tending to vary the terms of a written contract.

ACTION by J. L. Hinton against the Mutual Reserve Fund Life Association, heard by *Judge M. H. Justice* and a jury, at May Term, 1903, of the Superior Court of PASQUOTANK County. From a judgment for the plaintiff, the defendant appealed.

Pruden & Pruden and *Shepherd & Shepherd*, for the plaintiff.

J. W. Hinsdale & Son, for the defendant.

CONNOR, J. The plaintiff alleges that on November 8, 1897, the defendant corporation issued its policy to Mary F. Brothers for the sum of $2,000 payable to her executors or administrators, and that she paid the premiums on it as they fell due; that on the .... day of July, 1900, the said Mary died intestate, and the plaintiff was duly appointed her administrator; that proper proofs of death were duly

forwarded to and accepted by the defendant and demand made for the payment of the amount of said policy and refused.

The defendant, answering, admitted issuing the policy, denied that Mary F. Brothers paid the premiums, admitted the death and denied that proper proofs of death were forwarded to and accepted by the defendant. The defendant also alleged that certain statements made by the insured in regard to her health were false; that such statements were, by the terms of the policy, made a part of the consideration upon which it was issued, etc. For a further defense, the defendant alleged that on and before the date of the policy Mary F. Brothers was the wife of Joseph S. Brothers; that said Joseph purchased from C. L. Hinton, a son of the plaintiff, a tract of land which he represented to contain one hundred and fifty acres, for which the said Joseph promised to pay $2,000; that said C. L. Hinton executed a deed to the said Joseph, and at the same time and as a part of the transaction the said Joseph executed his note to C. L. Hinton for $2,000 and a mortgage on said land to secure its payment; that the plaintiff was the real owner of the land, and that C. L. Hinton acted for his benefit in the sale thereof; that on November 2, 1897, he transferred said note to the plaintiff; that the tract of land contained only one hundred and seven acres and was not worth more than $500, as was well known to both parties to said contract; that before November 2, 1897, it was agreed between said Joseph and the plaintiff that said Joseph should insure his life for the sum of $2,000 to secure the said indebtedness; that in consequence of said agreement the said Joseph made application for such insurance, but the application was rejected by the company to which it was addressed; that thereafter, and before the second day of November, the plaintiff requested the said Mary F. Brothers to insure her life to

secure the said indebtedness; that pursuant to such request she made application to the defendant for a certificate of membership; that upon the faith of the representations made in the application, a certificate was issued payable to the estate of Mary F. Brothers; that the plaintiff, having no insurable interest in the life of said Mary, and well knowing that the defendant would not issue a certificate to said Mary payable to him as beneficiary, wrongfully and unlawfully entered into an agreement with the said Mary and the said Joseph, before or at the date of the application for said certificate, by which it was agreed that the said policy should on its face be made payable to the estate of the said Mary, but that the plaintiff should pay any and all dues and assessments upon said policy, and upon her death the amount of said policy should be paid to the plaintiff in full of the indebtedness of said Joseph, and he would cancel the said mortgage, etc.; that at the time of or before making such application the said Mary promised and agreed to assign said policy to the plaintiff; that pursuant to said agreement the plaintiff paid the admission fee and all dues and assessments levied upon said policy; that in pursuance of said agreement the said Mary on the .... day of December, 1897, executed an assignment of said certificate or policy to the plaintiff, a copy of said assignment being attached to the answer; that the husband of the said Mary did not sign or consent in writing to the execution of said agreement, and no notice of the assignment was given to the defendant until after the death of the said Mary F. Brothers; that upon the death of said Mary the plaintiff notified the defendant that he was the holder of said policy by assignment, made proof of claim as such, and requested payment of the amount thereof.

The defendant refused to pay the amount to the plaintiff or to recognize him as assignee, whereupon the plaintiff

demanded payment to him as administrator; that while this action is prosecuted by the plaintiff as administrator, the purpose is to secure the payment thereof for his sole benefit, personally, in pursuance of the said agreement; that the plaintiff had no insurable interest in the life of Mary F. Brothers, and that the agreement between the plaintiff Joseph S. and Mary F. was a fraud upon the defendant, and the policy was a wager, and in consequence thereof void.

It is provided in the policy that no assignment or change of beneficiary shall be valid without the consent of the company; that the assignee must have an insurable interest. The plaintiff filed no reply to the new matter set up in the answer. The defendant made a motion, before answering, to set aside the service of summons on the Insurance Commissioner. This was refused and the defendant excepted. This question has been settled adversely to the defendant and the exception cannot be sustained. *Moore v. Life Asso.*, 129 N. C., 31.

When the cause was called for trial the defendant tendered a series of issues directed to the several matters set up in the answer by way of defense to the action. The plaintiff objected and the Court declined to submit either of the defendant's issues, to which exception was noted. The Court thereupon submitted the following issues: "1. Is defendant company indebted to the plaintiff as alleged in the complaint?" "2. If so, in what sum?" "3. Did Mary F. Brothers obtain the policy of insurance by fraudulent representation?" The defendant excepted.

It was admitted that the said Mary was dead and the plaintiff was her administrator. The plaintiff introduced the policy and so much of the answer as admitted the receipt of proofs of loss, and rested.

The defendant introduced Joseph S. Brothers and pro-

posed to prove by him each and every allegation in the answer as a further defense as above set forth. The questions propounded to the witness are set forth in full in the case on appeal and cover each and every one of said allegations. To this testimony the plaintiff objected. The objections were all sustained and the defendant excepted. There were other exceptions to the exclusion of testimony in regard to the physical condition of the insured, and it may be that they will not arise upon another trial.

Without entering into a discussion of the several exceptions bearing upon this phase of the case, we think there was evidence proper to be submitted to the jury under proper instructions, upon the third, or some appropriate issue, directed to the questions raised by the defense in regard to the condition of the health of the insured at the time the policy was issued and the representations made by her in the application.

The defendant also offered to prove that Mary F. Brothers was a woman of no property with which to pay life insurance premiums or assessments, and no capacity or ability to earn any money for that purpose. This testimony, upon objection, was excluded and the defendant excepted. The defendant offered to read the assignment in evidence. Upon the plaintiff's objection it was excluded and the defendant excepted. There was evidence tending to show that Mary F. Brothers worked in the field, did washing, picked cotton and performed other like labor. She died a few months after giving birth to twins. She was illiterate and unable to sign her name.

The plaintiff's contention is that the entire testimony, if admitted, failed to show any defense to the action. If he is correct in this, of course such testimony was immaterial and its rejection harmless. The proposed testimony was

clearly relevant to the issue and the witness competent to testify to such facts as were within his knowledge.

It would seem very clear that if the testimony offered by the defendant is true, as we must for the purpose of disposing of this appeal take it to be, a fraud was practiced upon the insurance company. It is expressly alleged, and, in support of the allegation, was proposed to be shown, "that John L. Hinton had no insurable interest in the life of Mary F. Brothers, and well knowing that the defendant would not issue a certificate of membership on the life of said Mary F. Brothers payable to him as beneficiary, entered into an agreement with the said Mary F. Brothers and the said Joseph S. Brothers, her husband, before or at the date of the application for the certificate of membership or policy of insurance, by which it was agreed that the said policy should on its face be made payable to the estate of the said Mary F. Brothers, but that said John L. Hinton should pay any and all dues and assessments upon said policy, and upon her death the amount of said policy should be paid to the said John L. Hinton, who upon receipt of the amount thereof from the defendant should receive the same in full payment of the indebtedness of said Joseph S. Brothers to him, and that he should thereupon cancel and discharge the said mortgage upon the said tract of land. * * * In the light of the further testimony proposed to be introduced that the real value of the land sold was but $500, and that the plaintiff paid the premiums and assessments, and within a month after the policy was issued the said Mary assigned it to the plaintiff, that none of these facts were known to the defendant, although there was a plain provision in the policy that no assignment should be valid until notice given to the company, the defendant was entitled to have an issue submitted to the jury inquiring as to the truth of the allegations, and in our opinion the proposed testimony was mate-

rial and competent to be heard and considered by them upon such issue.

The defendant further says that the policy was what is known in the books as a wager upon the life of Mary F. Brothers, and therefore void as against public policy. Whatever conflict there may be, and it must be conceded that there is very much, as to what constitutes an insurable interest in the life of a person, this Court has adopted a well-defined principle which meets our approval.

Burwell, J., in *College v. Insurance Co.,* 113 N. C., 244, 22 L. R. A., 291, after naming several cases, says: "These instances and others that might be mentioned seem to show that, except in cases where there are ties of blood or marriage, the expectation of advantage from the continuance of the life of the insured, in order to be reasonable, as the law counts reasonableness, must be founded in the existence of some contract between the person whose life is insured and the beneficiary, the fulfillment of which the death will prevent; it must appear that by the death there may come damage which can be estimated by some rule of law, for which loss or damage the insurance company has undertaken to indemnify the beneficiary under its policy. When this contractual relation does not exist, and there are no ties of blood or marriage, an insurance policy becomes what the law denominates a wagering contract, and under its rules, made and enforced in the interest of the best public policy, all such contracts must be declared illegal and void, no matter what good object they have in view." *Merrimon, J.,* in *Burbage v. Windley,* 108 N. C., 357, 12 L. R. A., 409, says: "As the insured had no insurable interest in the life of the *cestui que vie*, the contract was simply a wager." In that case the premiums were paid by the beneficiary. In *Albert v. Ins. Co.,* 122 N. C., 92, 65 Am. St. Rep., 693, the policy was taken out by the insured and premiums paid by her.

This Court sustained the policy. We have no disposition to question that case. The writer, if the question were an open one in this State, would feel constrained to follow the authorities holding the contrary view. The decision is sustained by the authorities cited. The testimony proposed in this case was that the agreement was made before or at the time of the application, and that the plaintiff was to pay the entrance fee and all further assessments, he not then having or expecting to have any insurable interest in the life of the insured. This is a very different case from one where the insured has taken out a valid policy, paying the premium thereon, either as a gift to some friend or as collateral security to a debt, and assigns the policy with the knowledge of the company. The plaintiff was to be paid his debt from the proceeds of the policy, he paying all of the premiums and awaiting her death to reap the profits of his bargain. In *Ruse v. Insurance Co.*, 23 N. Y., *Seldon, J.*, says: "A policy obtained by a party who has no interest in the subject of insurance is mere wager policy. Wagers in general, that is, innocent wagers, are at common law valid, but wagers involving immorality or crime or in conflict with any public policy are void. To which of these classes then does the wagering policy belong? * * * Such policies, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptation to the party interested to bring about the event insured against."

The learned Justice traces the history of the law and its development in England resulting in the passage of the act of Parliament declaring all such policies void, saying: "My conclusion therefore is that the statute of 14 George III. avoiding wager policies upon lives was simply declaratory of the common law, and that all such policies would be void independently of that act." *Burbage v. Windley, supra.*

While there are conflicting decisions in this country, a

careful examination of them brings us to the conclusion that the foregoing is the sound view of the subject. "Of all wagering contracts, those concerning the lives of human beings should receive the strongest, the most emphatic and the most persistent condemnation." *Ins. Co. v. Sturgis,* 18 Kan., 93, 26 Am. Rep., 751; *Price v. Knights of Honor,* 68 Tex., 366; *Ins. Co. v. Schaeffer,* 94 U. S., 457. *Mr. Justice Field,* in *Warnock v. Davis,* 104 U. S., 775, says: "Such policies create a desire for the event. They are therefore, *independently of any statute on the subject,* condemned as being against public policy." May on Ins. (4 Ed.), 44, 45.

The plaintiff, however, says that conceding this to be the law, the insured had an insurable interest in her own life; the policy was valid when issued; the assignment being invalid did not affect the integrity of the policy; that the right to maintain this action by the administrator of the insured is not affected by the void assignment. It is held in many cases, and we have no disposition to question the principle, that every person has an insurable interest in his own life and may insure his life for the benefit of his executors, administrators or assigns; that such policy being valid may be assigned to one having an insurable interest. We do not question the validity of assignments of life insurance policies to a creditor, or the right of the creditor to receive the amount of his debt, together with such sums as he has paid on account of assessments or premiums, or an assignment to one having any other insurable interest. That a creditor has an insurable interest in the life of his debtor is well settled. When the assignment of a policy is made in good faith to secure a subsisting debt, or a present loan, or a debt then contracted, the courts have sustained such assignment, certainly to the extent of such indebtedness and premiums paid out to keep the policy alive. *Carmack v.*

Lewis, 82 U. S., 643; *Ins. Co. v. Shaeffer,* and *Warnock v. Davis, supra;* May on Insurance, 80, *et seq.* The defense made and the testimony proposed to be introduced go very far beyond the principle upon which these cases rest. The allegation here is that at and before the application was made there was an agreement between the plaintiff, the husband and the insured that the policy, although in truth and in fact was to be for the benefit of the plaintiff, who knew that he had no insurable interest in the life of the wife and knew that the company would not issue the policy payable to him, should be made payable to the estate of the wife and immediately assigned to the plaintiff, who was to pay the admission fee and all of the premiums.

In *Asso. v. Norris,* 115 Pa. St., 446, 2 Am. St. Rep., 572, application was made by the assured for and a policy issued on her life payable to her son-in-law, Norris. Pursuant to an agreement made before the application Norris assigned the policy to one Spangler, having no insurable interest in the life of the insured, who paid all of the assessments. Notice of the assignment was given to the company. Spangler was the medical examiner of the company and it was for that reason the policy was not made payable to him. Suit was brought upon the death of the assured by Norris to the use of Spangler. The Court said: "If now we admit that Norris had such an interest in the assured as would have warranted him in taking a policy on her life, yet that fact cannot help out the plaintiff's case, since the policy was not founded on that interest, neither was it for the benefit of Norris, but for the benefit of one who had no interest in the insured's life." The principle upon which the testimony offered by the defendant is made material is thus stated by the Supreme Court of Texas in *Ins. Co. v. Hazelwood,* 75 Texas, 338, 16 Am. St. Rep., 893, 7 L. R. A., 217, quoting from Bishop on Life Insurance: "The question

is whether the policy was in fact intended to be what it purports to be, or whether the form was adopted as a cover for a mere wager. If the plaintiff and the insured confederate together to procure a policy for the plaintiff's benefit, when he is not and does not expect to be a creditor of the insured, and with a view of having the policy assigned to him without consideration, the policy is void. There are respectable authorities which hold that the assignment of the policy without regard to any pre-existing agreement, to one having no insurable interest, is a fraud upon the company, against public policy and therefore avoids the policy." This view is strongly stated by *Horton, C. J.*, in *Ins. Co. v. Crum*, 36 Kansas, 146, 59 Am. Rep., 537. To the suggestion that the attempted assignment was void, he says: "The law does not tolerate attempted frauds any more than it does those that are committed. * * * If the beneficiaries can now recover, they are doubly benefited by the questionable transaction in which they were engaged."

The Supreme Court of Pennsylvania, in *Guilford v. Moose*, 104 Pa. St., 74, 49 Am. Rep., 570, expresses itself in very vigorous terms regarding wagering life insurance contracts in every form: "The very foundation of the doctrine is that no one shall have a beneficial interest of any kind in a life policy, who is not presumed to be interested in the preservation of the life insured. * * * The beneficiary is directly interested in the death of the insured. Moreover, if such a transaction were permitted, the wager could always be concealed under the mere form of the policy. Nor can we see that did the defendant's case depend upon an assignment directly from Moose to himself, how it could be bettered in the least." The opinion concludes with these words: "So fraught with dishonesty and disaster and so dangerous even to human life has this insurance gambling become, that its toleration in a court of justice ought not for one moment

to be thought of." Mr. May, in the last edition of his work on Insurance, comes to the same conclusion: "And although innocent wagers were once sustained, the courts will not now waste their time in discussing the question whether what is substantially a wager ought or ought not to be held good upon any grounds. Under the influence of a healthy public sentiment they have become impatient of investigating disputes founded upon any species of gambling, and almost without exception refuse to enforce a contract supported by such a subject-matter." May on Insurance, 74. It is said, however, that the suit is by the plaintiff as administrator and the recovery will be for the benefit of the estate of Mary F. Brothers. The record shows that the defendant offered to show that, while the action is prosecuted in the name of the plaintiff as administrator, the purpose thereof is to secure the payment of the policy for the sole benefit of the said John L. Hinton, personally, in pursuance of the agreement set forth in the answer. This was excluded. If this were proved, it would be a singular result if by this means the plaintiff can reap the profits of a contract denounced by the law as contrary to public policy. If the agreement alleged to have been made by the parties to the transaction is shown by competent evidence and found by the verdict of a jury, it would be a reproach to the law if the two living parties can use its process to gather the fruits of their illegal agreement after the death of the one who was the ignorant and passive instrument of the scheme to make profit by her death. The testimony was competent. It is said, however, that to permit the testimony to be introduced violates the rule excluding parol evidence to contradict a written instrument. The proposed testimony in no manner contradicted the terms of the policy. It was offered to prove an agreement collateral to the policy. As his Honor excluded the entire testimony offered by the defendant as immaterial,

and as the case was argued before us upon that view, we cannot indicate otherwise than by the general principles announced what portions of it are competent.

The extent of our decision is that the defendant is entitled, if it can, to show that the application was made and the policy obtained under the circumstances and for the purposes alleged, and that the defendant had no notice of the agreement or of the assignment of the policy.

For the refusal to submit the issues tendered by the defendant, or such others in lieu thereof as the Court may think proper, and to receive testimony material and tending to prove the affirmative of the issues, there must be a

New Trial.

WALKER, J. I concur in the result of this appeal upon the grounds first stated by the Court in its opinion, namely, that the defendant is entitled to a new trial, because of the erroneous ruling of the presiding Judge upon the question as to the condition of the health of the insured at the time she applied for the policy and the same was issued to her, and as to the representations made in the application. This error extends to all the issues, as a false, fraudulent and material representation in regard to the state of the insured's health, if found by the jury, will vitiate the policy.

REYBURN v. SAWYER.

(Filed May 3, 1904).

1. NUISANCE—*Injunction.*

The facts in this case entitle the plaintiff to an injunction restraining the defendant from maintaining fish nets in the channel near the property of the plaintiff.

2. INJUNCTION—*Nuisances—Damages.*

One suffering peculiar injury from a public nuisance is not restricted to an action for damages, but may sue for an injunction.

3. INJUNCTIONS—*Nuisance—Insolvency.*

The insolvency of defendant, so that a recovery would be of no avail, and the injury irreparable, furnishes ground for an injunction to abate a nuisance erected by defendant.

ACTION by John E. Reyburn against D. C. Sawyer, heard by *Judge M. H. Justice,* at Spring Term, 1903, of the Superior Court of DARE County.

Action to restrain by injunction the defendant from maintaining a nuisance, referred to, have decided all issues of fact and law. The referee, from the evidence, finds the following facts, to-wit:

1. Durant's Island is a body of land lying in Dare County, surrounded by the waters of Albemarle Sound, Alligator River, East Lake and the Haulover, and is well known by the name of Durant's Island; all of said waters and land lie wholly within the State of North Carolina.

2. Durant's Island is swamp or marsh land, except a little around the shore, which is a sand ridge.

3. That on the southern side of the island is a creek or bay making into said island from Albemarle Sound, which creek or bay is known as Tom Mann's Creek.

4. On April 18, 1890, the State Board of Education made and executed a deed unto John E. Reyburn, the plaintiff, which deed was recorded in Dare County. Said deed describes and the boundaries include Durant's Island.

5. Near the shore of Tom Mann's Creek the plaintiff has erected several houses, which are now, and have been continuously since April 18, 1890, occupied by plaintiff and his servants or agents.

6. The plaintiff has a house known as an ice-house, which is situated over the water of Tom Mann's Creek, which house is connected with the land by a wharf or pier.

7. The plaintiff has cut a canal about ten feet wide and thirty inches deep, which canal connects the waters of Tom Mann's Creek with the waters of Frying Pan, and has built some roads on the island. The said canal was cut prior to the erection of the nets hereinafter referred to.

8. Since 1890 the plaintiff has continuously kept on said island at least two men, who have lived in the houses which were built by plaintiff, and has also kept thereon a stock of cattle and some poultry.

9. In 1890, after the execution of the deed by the State Board of Education, the plaintiff posted notice on Durant's Island forbidding others from trespassing thereon, and has kept others from trespassing upon said island.

10. There is a channel leading from Tom Mann's Creek into Albemarle Sound, which channel, after leaving the creek, turns eastwardly and westwardly nearly parallel with the general curvature of the shore of the island, and running eastwardly until it gets near the north-eastern end of the island abreast of the Haulover, where it connects with the deep water of Albemarle Sound, which lies to the northward.

11. From near the mouth of Tom Mann's Creek, going eastwardly to where it connects with the deep waters of Albe-

marle Sound, this channel is from five to six feet in depth and varies from one hundred and seventy-five to six hundred feet in width. There are shoals in this channel upon which the water is only four feet deep.

12. On the northern or sound side of this channel is a reef or shoal running nearly parallel with the shore or island, which reef or shoal terminates nearly opposite Haulover. This reef or shoal varies in width from thirty to one hundred and fifty feet wide. The water on this shoal or reef is from three to four feet deep, and deeper abreast of Tom Mann's Creek than at other parts, except where the shoal terminates nearly abreast the Haulover.

13. The channel above mentioned extends to the west of the mouth of Tom Mann's Creek.

14. On the southern or shore side of this channel the water gradually shoals until it approaches the shore, but in some places it is as deep as in the channel.

15. The waters on the southern or shore side of the above-mentioned reef are navigable for boats drawing from three to four feet of water. That part of Albemarle Sound on the inside, or shore side of the above-mentioned reef or shoal, is usually and almost entirely navigated and used by boats called shad boats or sprit-sail boats, which boats when loaded draw about thirty inches of water. Boats of smaller size are also used inside of the said reef or shoal, and occasionally boats of larger size, drawing from three to four feet, come inside this reef or shoal. Boats drawing as much or more than seven feet of water can navigate the waters of Albemarle Sound on the outside of the said reef or shoal, and can pass from Albemarle Sound through connecting waters to the Atlantic Ocean.

16. When it is calm, or in moderate weather, boats drawing thirty inches can cross the reef or shoal. In rough weather, and especially when the wind is from the north,

north-east or north-west, boats drawing as much as two feet of water cannot cross the reef or shoal with safety, and in such weather boats of smaller size are not safe in Albemarle Sound. When the wind is from the north, north-east, or north-west, this reef has the effect to break the force of the waves beating upon the lee shore, and it is smoother on the inside of the reef than on the outside, and safer for such boats as usually go on the inside than it would be on the outside of the reef.

17. The defendant, prior to the institution of this suit, placed a line of stakes in the waters of Albemarle Sound, which stakes are from two and one-half to four inches in diameter at the water's edge, and larger at the bottom, and extend four or more feet above the water, and are firmly set or driven in the soil under the water. These stakes are nearly abreast of the Haulover and run across the mouth of the above-mentioned channel, and are one hundred and forty feet from its mouth and one hundred and forty feet from the eastern end of the reef, and run parallel with the channel as it empties into the sound, and run nearly at right angles to the reef. The first pocket or pound is from one hundred to one hundred and fifty yards from the reef on the sound side.

18. These stakes for the nets originally began about one hundred yards from the shore, and from that point extended out into the sound a distance of from 1,000 to 1,200 yards. There were two stakes between the shore end of said net stakes and the shore, which two stakes have been removed since this suit began. The stakes starting from the net stake nearest the shore are placed about sixty feet apart, running out a distance of two hundred to three hundred yards. These stakes are called lead stakes. At about a distance of two hundred to three hundred yards from the shore end of the line of stakes a square thirty-six feet each

way is formed by stakes of similar size, the stakes forming this square are about thirty-six feet apart, and have smaller stakes from twelve to eighteen feet apart between them. This forms the pocket of the net. From the outer side of this pocket, another line of lead stakes starts and runs out about two hundred and fifty yards, when another pocket is formed, and this continues until four pockets have been formed. The whole row of stakes extend into the sound about 1,200 yards from the stake nearest the shore.

19. At certain times during the year a net is attached to these lead stakes running from the stakes nearest the shore to the pound stakes; this net is made of net twine, and is hung upon ninethread manilla rope, which is about three-eighths inch in diameter, which manilla rope is tied to the lead stake at about the level of the water with marlin. The net drops down in the water. These lead lines sag so as to drop about twelve to eighteen inches below the top of the water in the center between the stakes. This is the usual method of setting Dutch nets.

20. There is attached to the pocket or pound stakes a pocket or pound net made of similar twine, with smaller meshes, tied to similar ropes, which ropes are tied to the pocket or pound stakes with marlin. This pocket or pound of the net is about twenty-eight feet square and is level with the water, and tied to the stakes so as to be kept level with the water and to prevent sagging. About two feet above the pocket another line of rope is tied to the pocket stakes. This line of rope, which is tied to the pocket stakes, is called a hand-line and is about two feet above the level of the water-line. The mouth of the pocket is on the side next to the lead. This is the usual method of setting Dutch nets.

21. When these stakes are broken off and left in the water so that they do not show above it, a boat might run on one of them, and they become more or less dangerous, as

they are liable to, or might knock a hole in the bottom or side of a boat.

22. The nets are usually set, in that section, about seven months in the year. The referee is unable to find from evidence when the nets in question were hung upon the stakes, or how long remained, or when taken up. The referee finds that the nets in question were hung to the stakes, or set, and have been taken up at least once, and have been put down again. The stakes have not been taken up since set.

23. Boats such as are commonly used and such as can be used in navigating the waters of Albemarle Sound when the nets are not set, can with ease and safety pass between the stakes in the lead of the nets, and should one of such boats strike one of the stakes it would not necessarily injure, or delay the boat. If the stake were rotten or broken off at or below the water's edge, it would be more apt to injure the boat than if it were sound and as originally set.

24. Shad, or sprit-sail boats, and such other boats as usually navigate the waters of that part of Albemarle Sound lying inside of the reef or shoal, can, when the nets are not set, pass between the stakes of the pocket or pound, but not with ease, and these stakes are more apt to injure or delay a boat than the stakes in the lead.

25. When the nets are set, shad or sprit-sail boats or smaller boats, and boats as large as any that usually or can navigate the waters of that part of Albemarle Sound lying south of the reef, can, and generally with safety and without delay or hindrance, pass over the nets of the defendant by going over the lead.

26. When the nets are set boats can pass through the pocket or pound, but are liable to be delayed, obstructed and hindered in their passage.

27. There are times, when the tide is low, the water rough, and the wind blowing hard, that boats, such as are commonly

used in that part of Albemarle Sound, cannot cross these nets with ease and safety and might be hindered or delayed by them.

28. There are times when there is but little wind, when, in order to pass over the nets, one would have to push down nets so as to let a boat go over. This can be done with safety, and with but little inconvenience, and without any practical delay.

29. Plaintiff cannot anchor his yacht where nets or stakes are placed, or so near thereto as will permit her to swing on the nets or stakes. There are no special advantages had by anchoring at the place where the nets are situated or so near thereto as to permit the yacht to swing on the stakes. The usual, customary, and best anchorage is in or near the Frying Pan. Occasionally the plaintiff anchors his yacht on the outside of the reef or shoal, which he can still do.

30. The post-office, from which plaintiff gets his mail while on the island, and from which the servants of plaintiff get their mail, is Mashoes, four miles to the eastward. In going to this post-office, or going to Manteo, from the island, you will have to cross the nets of the defendant or go around them.

31. In October, 1900 or 1901, Mr. B. G. Crisp, who is the attorney and representative of plaintiff in Dare County, went from Manteo to Durant's Island to see the plaintiff about a matter of business, expecting to return the next day. During the night the wind came on to blow very hard from the northwardly, and continued to blow very hard for two days. The waves were breaking over the reef to such an extent that the boatman who carried Mr. Crisp to the island would not cross the reef. Owing to the rough water on the reef and difficulty in crossing the reef with the breakers on it and the stakes in the channel, the boatmen were

afraid to venture out, and Mr. Crisp did not leave for two days. No attempt was made to start.

32. There are eleven stands of nets between Durant's Island and Mashoes, and in going to Mashoes from Durant's Island you cross eleven stands of nets besides the nets of the defendant.

33. None of the boats of the plaintiff, his servants or agents have been delayed or obstructed in any passage which they have undertaken, or have been compelled to change their course, or been damaged on account of the stakes or nets of this defendant, and the plaintiff and his servants or agents have not been prevented from taking any passage on the water on account of the nets of the defendant.

34. The plaintiff has access to his island from the waters of Albemarle Sound through the western end of the channel inside of the reef just to the west of Tom Mann's Creek, also through the channel at the east end of the island. In coming from the post-office or points east of Durant's Island the plaintiff would have to go around or over the nets; in passing from Tom Mann's Creek to the Haulover the plaintiff would have to cross the nets or go around them.

Upon the foregoing facts the referee finds the following conclusions of law:

(1) That the plaintiff is the owner of Durant's Island. The Code, section 2527; *Aycock v. R. R. Co.*, 89 N. C., 321.

(2) That the nets and stakes are a public nuisance.

(3) That as to the plaintiff, neither the nets or the stakes are a private nuisance.

(4) That the plaintiff is not entitled to recover damages for the setting and maintaining said nets, or to have the same abated.

From a judgment for the defendant, the plaintiff appealed.

J. W. Hinsdale & Son and *B. G. Crisp*, for the plaintiff.

Ward & Thompson and *E. F. Aydlett*, for the defendant.

MONTGOMERY, J. The referee's conclusions of law upon the facts found by him that the action of the defendant in the placing of pound nets in the manner in which they were set constituted a public nuisance was a correct one. *State v. Club,* 100 N. C., 477, 6 Am. St. Rep., 618. To prevent a multiplicity of private actions, the law provides a remedy for public nuisances in the way of an indictment, by which the nuisance can be abated or the offender punished by fine or imprisonment, or in both ways. The plaintiff in this action, however, alleges in his complaint that he has suffered, and further that he has shown by the proof that he has suffered, an unusual and special damage on account of the erection of the nuisance by the defendant, and that he therefore is entitled to redress by a civil action, that is, to have the nuisance abated at his own suit. The plaintiff's contention rests upon a sound principle of law, and where the facts go to show that a public nuisance has been the cause of unusual and special damage to an individual or a class of persons, as contradistinguished from a grievance common to the public, that person may bring a civil action for the redress of the injury. In *Mfg. Co.. v. Railroad,* 117 N. C., 579, 53 Am. St. Rep., 606, the defendant, by erecting a bridge across a river so low as to obstruct the passage of boats plying up and down the stream, thereby prevented a steam-boat from carrying a cargo of merchandise for a consignee up the river and beyond the bridge. The Court held that the defendant was liable in damages for the injury done to the plaintiff, on the ground that the damage was special and unusual to the plaintiff. The Court said there: "It is not material whether this particular boat was licensed, or whether other individuals owned boats that were engaged in navigating the river. If the plaintiff suffered damage common to a class whose business required the transportation of material for manufacturing purposes from

a point below the obstruction to a place located above it, but not common to the whole public, his right is not impaired by the fact that the boat was doing business as a common carrier, as well as for the manufacturer who owned it." The same principle was announced in *Downs v. High Point,* 115 N. C., 182. It is a principle of law found stated in all of the text writers on the subject of nuisance and in the decisions of many of the courts of the States. If the facts be such as the plaintiff claims he has shown them to be in this action, his right to relief by a civil action appears to be clearer in principle and more necessary to the peace and order of society than were the plaintiff's rights in the cases we have cited.

The plaintiff here is the owner of a tract of land (Durant's Island) situated in the midst of navigable waters, and it is necessary to the full and free enjoyment of his property that his access over the waters to that property and his egress from it should not be obstructed by nuisances erected athwart the channels of approach. The claim of the plaintiff is, that not only was the erection of the fish nets, in the manner in which they were constructed by the defendant, a public nuisance, but that it prevented the free use and enjoyment of his private property, which was a damage and an injury to himself, not in common with the public at large, but as extraordinary and special in its effects upon him. In *Blanc v. Plumple,* 29 Cal., 156, the Court said: "Undoubtedly if the obstructions only affect the plaintiff in common with the public at large, although in a greater degree, he cannot have his private action; but if he is thereby obstructed in the free use of his property, and its comfortable enjoyment by him is thereby interfered with, and to some extent prevented, can it be said he suffers in common only with the public at large? Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the

free use of property, so as to interfere with the comfortable enjoyment of life or property, is declared to be a nuisance and the subject of an action, and it is further provided that such action may be brought by a person whose property is injuriously affected. In *Wilder v. DeCon,* 26 Minn., 10, the Court decided that the owner of a town lot suffers a peculiar damage by the obstruction of a portion of a public street immediately in front of his lot, and that he might therefore maintain an action to prevent such obstruction, although the same may be a public nuisance. In *Rex v. Dewsnap,* 16 East., 196, *Lord Ellenborough* said: "I did not expect that it would have been disputed at this day, though a nuisance may be public, yet that there may be a special grievance, arising out of the common cause of injury, which presses more upon particular individuals than upon others not so immediately within the influences of it. In the case of stopping a common highway, which may affect all the subjects, yet if any person sustains a special injury from it he has an action. This must necessarily be a special grievance to those who live within the direct influence of the nuisance and are therefore parties aggrieved within the statute allowing such parties costs." In Wood on Nuisances, pages 886, 887, it is said: "Redress may be had through the medium of a private action in behalf of each person specially injured, although the same damage is inflicted upon many persons at one and the same time, as an obstruction of a highway leading to one's premises, or so as to obstruct access thereto, or otherwise producing special damage: the obstruction of a navigable stream so as to hinder or delay passage over the same, or producing actual damage to vessels, or by cutting off the approach to a private wharf or premises so as to injure one's premises, is such a special injury as enables the person so injured to maintain an action." In *Park v. Railroad,* 43 Iowa, 636, a correct sylla-

bus of the decision may be stated as follows: "Injuries resulting from the obstruction of highways leading to the premises of the party complaining and interfering with access to them are proper grounds of recovery by the injured party, and this is so although many others sustain similar injuries from the same cause."

And we are of the opinion that one who suffers damage, through the erection of a public nuisance, unusual and special to himself, is not confined in his remedy to an action merely for damages, especially where the damage arises from an injury and obstruction to the free use and enjoyment of one's property—lands and tenements, as in this case. In 2 Wood on Nuisances, page 1159, the author says: "Any person injuriously affected by a nuisance, who could maintain an action at law therefor, can maintain a bill in equity for an injunction." And *Barnes v. Hatthorn,* 54 Mo., 127; *Thebaut v. Conova,* 11 Fla., 143; *Peck v. Elder,* 3 Sandf. (N. Y.), 126; *Danner v. Valentine,* 5 Metc., 8, are cited in support of the text. Indeed, in a case like the present, it would be impossible to fix with any degree of certainty the damages which the plaintiff ought to recover for the obstruction of his access to his property; and this Court has said in *Jolly v. Brady,* 127 N. C., 142: "But when the damage cannot be reasonably compensated in a suit at law, or the injury is irreparable, the Court will stay the injury by injunctive order until the parties shall have the main facts determined by a jury." In Wood on Nuisances, page 119, it is said that "When the injury is not susceptible of adequate compensation in damages, or where the injury is a constantly recurring grievance, a court of equity will interpose by injunction." In *Works v. Railroad,* 5 McLean, 525, the Court said: "If such injury exists, no adequate remedy can be found by an action at law. From the nature of the injury its extent cannot be ascertained with

precision. It is permanent; consequently the suits at law for redress must be endless. In such case adequate relief can be given only by injunction. It prevents the wrong. To establish this wrong it need not be measured by dollars and cents. It must be shown to exist; it must be material, but the particular amount of damage need not be shown."

But, besides, in this case it appears that if damages could be made a sufficient compensation for the injury done to the plaintiff, a recovery would be of no avail on account of the insolvency of the defendant, and the injury would therefore be irreparable. In 1 Beach on Injunction, section 34, it is said: "A court of equity in the exercise of its discretion may grant an injunction to prevent a breach or an injury for which there can be no other redress on account of the defendant's insolvency"; and in *Kerlin v. West,* 4 N. J. Eq., 449, it was declared that an injury may be irreparable, either from its nature or the want of responsibility in the person committing it. 10 Ency. Pl. & Pr., page 956.

So far we have considered this case on the theory that the referee had found the facts as the plaintiff insisted they should have been found from the evidence. The referee, however, found as a fact that "none of the boats of the plaintiff, his servants or agents, had been delayed or obstructed in any passage which they have undertaken, or had been compelled to change their course, or been damaged on account of the stakes or nets of this defendant, and the plaintiff and his servants or agents have not been prevented from taking any passage on the water on account of the nets of the defendant." If there had been no other finding of fact by the referee on the subject of the obstruction of the plaintiff's access to his premises, the judgment of the Court below upon the referee's report would have to be affirmed. But there was another finding of fact on that subject, and one totally inconsistent with the finding which we have quoted

above, which will result in a reversal of the legal conclusion upon those findings. The inconsistent finding of fact referred to is in these words: "In October, 1900 or 1901, B. G. Crisp, who is the attorney and representative of the plaintiff in Dare County, went from Manteo to Durant's Island to see the plaintiff about a matter of business, expecting to return the next day. During the night the wind came on to blow very hard from the northwardly, and continued to blow very hard for two days. The waves were breaking over the reef to such an extent that the boatmen who carried Crisp to the Island would not cross the reef. Owing to the rough water on the reef and the difficulty in crossing the reef with the breakers on it and the stakes in the channel, the boatmen were afraid to venture out, and Crisp did not leave for two days. No attempt was made to start." We are of the opinion that upon that finding of fact the Court should have given judgment that the plaintiff should have his injunction for the abatement of the nuisance.

Error.

DOUGLAS, J., concurs in result only.

MINNISH v. RAILROAD CO.

(Filed May 3, 1904).

CARRIERS—*Mileage Book—Contracts—Executors and Administrators.*

Where a carrier sells mileage, and the purchaser dies, the carrier is not required to carry the body of the deceased purchaser on such mileage.

ACTION by W. L. Minnish against the Southern Railway Company, heard by *Judge T. J. Shaw* and a jury, at November Term, 1903, of the Superior Court of CALDWELL County. From a judgment for the plaintiff both parties appealed.

Edmund Jones and *Lawrence Wakefield,* for the plaintiff.
S. J. Ervin, for the defendant.

PER CURIAM. The plaintiff had no contract with the defendant to transport the body of his deceased wife from Washington to Hickory. The mileage book was issued to her, and at her death the unused mileage goes to her personal representatives. In no aspect of the evidence is the plaintiff entitled to maintain the action. It must be dismissed.

Action Dismissed.

WILSON v. GREEN.

(Filed May 11, 1904).

TAXATION—*Assessments—Injunction—Remedy at Law—Acts 1903, ch. 251—The Code, sec. 3822.*

Acts 1903, ch. 251, provides a plain and adequate remedy at law to test the validity and regularity of a tax assessment, and it cannot be tested by an injunction.

ACTION by F. H. Wilson and others against A. H. Green and others, heard by *Judge W. R. Allen,* at chambers Raleigh, N. C., October 10, 1903.

This action was brought by the plaintiffs in behalf of themselves and all other tax payers of Raleigh Township and the city of Raleigh who will come in and make themselves plaintiffs, to declare null and void the valuation and assessment of real property in said township and city for taxation as shown by the lists of the assessors made in the year 1903 for the year 1903-04, and further to enjoin the Board of Commissioners of the county of Wake and the city of Raleigh from levying any tax based upon the said assessment, and the Sheriff of Wake County from collecting any tax levied upon the valuation of real property for taxation in the township and city.

The pleadings in the case, and the evidence, which is in the form of affidavits, exhibits and depositions, are very voluminous, but it will not serve any useful purpose for us to state at length their contents. A substantial statement of the grounds upon which the plaintiffs base their right to relief will be sufficient to present the point in the case.

The plaintiffs allege that the commissioners appointed three list takers and assessors for Raleigh Township at the meeting of the board in April, 1903, but that they were not "discreet freeholders in said township," as the law requires

they should be, in that they had no such knowledge or experience in respect to the value of real property in said township as would render them competent to value the same for taxation, and that they were not freeholders in the township. It is further alleged that the board did not sit together in fixing the value of property, but in many instances, the valuation was made by one member and, in some cases, by two members of the board, and merely acquiesced in by the said member or members who took no part in the valuation, without having had any view of the property. Plaintiffs further allege that the Board of List Takers and Assessors and the Board of Equalization, to whom they made their return, instead of to the Board of Commissioners, as required by law, acted partially, arbitrarily, fraudulently and oppressively in the discharge of their respective duties, and that plaintiffs and other tax payers had no fair or reasonable opportunity to be heard in their own behalf concerning the valuation of their property, though they had requested the Board of Equalization to grant them a hearing; and that by reason of the unlawful and wrongful conduct of the two boards the real property in the said township was not fairly and uniformly assessed as required by the law, but grossly excessive, unequal and discriminating valuations were placed thereon, and that the property of the plaintiffs and of those of the other tax payers of the township, who are similarly situated, will not be "taxed by a uniform rule" and according to its value. Other grave and serious charges are made against the boards, but it is not necessary that they should be set out.

The defendants in their answer, which is full and explicit, deny all of the material allegations of the complaint, and aver that the Board of List Takers and Assessors and the Board of Equalization acted fairly, impartially and justly in the performance of their duties. They set forth with

much detail the manner in which the property was valued and how the assessments were afterwards adjusted and equalized. They allege that the assessment in force prior to the month of June, 1903, was far below the true value of the property, and that the increase in valuation was made only when it was found that property had been undervalued. They further aver that every tax payer had a fair opportunity to be heard before the Board of Equalization, and when any complaint of excessive valuation was made it received full consideration from the board. They admit that C. D. Arthur, a member of the Board of List Takers and Assessors is not a freeholder in Wake County, but owns real property in the county of Carteret.

The case came on to be heard before *Judge W. R. Allen* upon motion of the plaintiff for an injunction to the hearing, a restraining order having been previously granted by *Judge Peebles,* when an order was entered refusing the motion and the plaintiffs excepted and appealed.

Busbee & Busbee, Battle & Mordecai and *Peele & Maynard,* for the plaintiff.

Armistead Jones & Son, W. L. Watson, B. M. Gatling and *Argo & Shaffer,* for the defendant.

WALKER, J., after stating the case. While, under our present procedure, we have but one form of action, the difference between actions at law and suits in equity having been abolished, yet the distinction between legal and equitable principles has been fully retained, and equity has no jurisdiction when there is an adequate, complete and certain remedy at law, and it is equally well settled as a rule of the Court of Equity, which still obtains, that there will be no interference by injunction when there is a sufficient remedy at law. This simple and elementary doctrine is applicable

to all cases when the complaining party can have adequate relief by the prosecution of his legal remedy in the courts, or when relief can be obtained by resorting to those methods of procedure pointed out by the statute in cases where a body or tribunal, whether strictly speaking a court or not, is invested with power and authority to hear and determine the matter and to administer such relief as the nature of the case may require. This principle is especially applicable to controversies arising out of the exercise of the taxing power. If parties will act seasonably and present their complaints, verified by proper proofs, to the officers of the law clothed with the necessary authority to act in the premises and to redress their grievances, they will find that the remedy afforded by the statute is adequate for the correction of all the errors and injustice liable to be committed by those who are appointed by law to assess property for taxation in the performance of their official duties. By the act to provide for the assessment of property and the collection of taxes (Acts 1903, chapter 251, page 355), commonly called the "Machinery Act," the Board of Commissioners of each county is required to appoint three discreet freeholders in each township to be known as the Board of List Takers and Assessors, who shall list and assess the real and personal property in their respective townships for taxation (section 12), and make a complete return of their assessments, embracing an abstract of the taxable property, to the Board of Commissioners of the county (section 17). It is further provided that the commissioners and the chairman of the Board of List Takers and Assessors for each township (including wards of cities and towns) shall constitute a board of equalization for the county, and shall meet on the second Monday in July and examine the returns of the list takers and assessors and equalize the valuation of property liable to taxation, so that each tract of land or lot, and each piece

or article of personal property, shall be entered on the tax list at its true value in money by raising the valuation when, after investigation, they find that it is too low, and by reducing it when they find that it is too high. This board, it seems, is given ample power and authority to adjust all valuations to a uniform standard, so that the burden of taxation, as it should do, may rest equally upon all persons whose property has been assessed. Power is also conferred upon the Board of Commissioners of the county by section 68 of the act to revise the tax lists and valuations returned to them by the list takers and assessors, and they are authorized to continue in session from day to day as long as may be necessary to make a complete and thorough revision of the lists and valuations. They are required to hear all persons objecting to the valuation of their property or to the amount of the tax charged against them, and they may summon and examine witnesses, including the list takers and assessors and correct the lists of the assessors as may be right and just, "so that the valuation of similar property throughout the county shall be as nearly uniform as possible." They have the right, upon a like examination and investigation, to raise the valuation of any property that they may decide has been undervalued.

In addition to these provisions for securing a fair and just assessment of property, the Legislature has created a board of State Tax Commissioners, with the power, to use the language of the statute, "To exercise a general supervision over the tax listers and assessing officers of this State, and to take such measures as will secure the enforcement of the provisions of this act, to the end that all the properties of this State liable to assessment for taxation shall be placed upon the assessment rolls and assessed at their true value in money," and "To receive complaints as to property liable to taxation that has not been assessed, or has been fraudu-

lently or improperly assessed, and to investigate the same, and to take such proceedings as will correct the irregularity complained of, if found to exist." The board is required to meet regularly on the first Tuesday of March, June, July, August, September and October of each year, and to adjourn the regular meeting from time to time when necessary for the proper transaction of business and the full performance of the duties of the board, and special meetings may be had at any time and at any place in the State if deemed advisable. They have the power under the act to hear complaints and correct individual assessments, or they can, if they see fit, make a revision of the entire assessment.

It would seem that these provisions of the law are comprehensive enough to afford ample protection to the tax payer against any excessive valuation, discrimination or abuse of power by the taxing officers. A thorough and complete system of procedure is established, by virtue of which the tax payer can be heard upon all questions concerning the valuation of his property for taxation, and be restored to any and all rights he may have lost by any irregular or fraudulent action of the assessors. The Board of County Commissioners and the Board of State Tax Commissioners, if not The Board of Equalization, are not only authorized to adjust and equalize the aggregate valuation of property as fixed by the Board of List Takers and Assessors, but they have the power to act as an original assessing body and review the lists and make an assessment *de novo* (section 9). It is important that the true extent and scope of the powers of these revising tribunals should be clearly understood and stated, because if they are possessed of the authority which, as we think, was intended to be conferred upon them, the plaintiffs have failed to avail themselves of the complete and adequate remedy which is thus afforded by the statute for the redress of their alleged grievances. The

remedy is not only certain but is simple, speedy and efficacious, and by every rule of procedure and practice it must be pursued and exhausted before the complainants can have recourse to the courts for equitable relief, and certainly before the Court will extend its aid in preventing or retarding the collection of the public revenues. No rule which does not impose this duty upon the party who seeks injunctive relief against the collection of a tax could be enforced without the most disastrous consequences to the State. The revenues derived from taxation are continually needed for the support and maintenance of government, and the almost fatal results which would follow the issuing of an injunction directed against an entire tax levy should give pause to any court called upon to act in so grave a crisis. We may safely say that it should never be done except upon the clearest necessity and when required for the protection of the admitted natural or constitutional rights of the citizen, and, even then, in such a way as to produce the least harm to the public interests. The controlling principle in such cases is thus stated by the text writers: "A court of equity will not by injunction pass upon the action of assessors and boards of review. Courts cannot convert themselves into assessors of property for purposes of taxation, and re-assess in every case where the assessor has erred in his judgment as to the value of property. In nearly all the States, probably in all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision, or equalization, as they are often termed, with sometimes a right of appeal from their decision to the courts of law. They are established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions." 2 Beach on Inj., section 1204. And if the complainant does

"not state that he applied to the board to correct the assessment, nor give a reason for not doing so, nor that he could not obtain relief in that way, if entitled to it," the action of the assessors cannot be called in question by an injunction. *Ibid.*, section 1205. "The fundamental principle applicable to such cases is that a court of equity is not a court of errors to review the acts of public officers in the assessment and collection of taxes, nor will it revise their decision upon matters within their discretion if they have acted honestly. Where therefore a particular manner is provided by law, or a particular tribunal designated for the settlement and decision of all errors or inequalities in behalf of persons dissatisfied with a tax, they must avail themselves of the legal remedy thus prescribed, and will not be allowed to waive such relief and seek in equity to enjoin the collection of the tax. And this upon the ground that where one has a complete and ample remedy at law, and slumbers upon his rights, he is estopped from invoking the aid of equity." 1 High on Inj. (3 Ed.), section 943. "If the tax payer may have adequate relief for excessive taxation by an appeal or application to a board of review or equalization, but neglects to avail himself of such remedy, he will be denied relief by injunction." *Ibid.*, section 493. "If the bill fails to negative the remedy at law and presents no reasons for not pursuing that remedy, it is demurrable." *Ibid.*, section 491. The doctrine as thus stated by the text writers has been approved by the courts. *Stanly v. Supervisors*, 121 U. S., 535; *Hughes v. Kline*, 30 Pa., 227; *Meade v. Haines*, 81 Mich., 261; *Keigwin v. Commissioners*, 115 Ill., 347; *Railroad v. Brooklyn*, 123 N. Y., 375; *Stewart v. Maple*, 70 Pa., 221; *Chisholm v. Adams*, 71 Tex., 678; *Bourne v. Boston*, 2 Gray, 494; *Macklot v. Davenport*, 17 Iowa, 379; *Merrill v. Gorham*, 6 Cal., 41; *Meyer v. Rosenblatt*, 78 Mo., 495;

Chapel v. County, 58 Neb., 544; *Commissioners v. Mining Co.,* 61 Md., 545.

We find a succinct statement of the principle in 21 Enc. of Pl. & Pr., page 436, as follows: "The statutory remedies thus provided to a party to have objections heard, and errors, such as overvaluation and other matters within the jurisdiction of the particular officers and boards corrected, are exclusive, at least in the first instance. Courts will not inquire into objections which should have been made in this manner, especially in the absence of an attempt to pursue the ordinary remedy." Numerous and pertinent cases, decided in the different States, are collected in a note to this passage, in support of what is therein stated as the law upon the subject.

This Court in *Hilliard v. Asheville,* 118 N. C., 852, which related to a local assessment, adopted and applied the same principle. The present *Chief Justice,* speaking for the Court, says: "At any rate, the act itself prescribed a special method by which the validity and regularity of such assessment can be contested, and the plaintiffs having that remedy cannot proceed by injunction. * * * The act being constitutional, whether any particular lot is overassessed or improperly assessed is a matter which must be litigated in the manner and by the proceeding provided for that purpose by the act itself."

In *Covington v. Rockingham,* 93 N. C., 139, it was sought to enjoin the collection of a tax upon the ground of over-assessment and irregularities, and the Court said: "If the tax list as made up contained errors, as it may have done, especially as most of the tax payers failed to render a proper list of their taxable property, as they were notified to do and ought to have done, they were nevertheless not without remedy. They, or any one or more of them, including the plaintiffs, might have applied to the commissioners

to readjust and correct any errors in the taxes charged against them respectively. They had the power to correct errors. The settlement of the tax list is always more or less a summary proceeding, and ought to be subject to correction upon proper application, and the Legislature, having an eye to this necessity, has wisely provided by statute (The Code, section 3823) the largest reasonable opportunity for correcting errors in it, even after it has passed into the hands of the collecting officer. This statute expressly embraces municipal corporations, such as the defendant, as well as counties. It does not, however, appear that the plaintiffs sought such relief. If they had done so any errors might have been corrected."

We conclude therefore that the plaintiffs have an adequate remedy for the correction of any inequalities in the assessments, and for the full redress of all the other grievances of which they complain.

We do not deem it necessary or profitable to discuss at length the other questions presented in the argument before us. The defendants have questioned the validity of that provision of the statute requiring the assessors to be freeholders upon the ground that they are officers, and by Article I, section 22, of the Constitution no property qualification can affect the right to hold office. Even if the requirement is valid, the plaintiffs cannot attack the legality of the organization or formation of the Board of Assessors in this collateral proceeding by showing that the assessors were not freeholders. They should have applied to the Board of Commissioners to correct their mistake in appointing them, if there was any mistake, or at least have instituted some direct proceeding to test their qualification. *Keigwin v. Commissioners, supra; McDonald v. Teague*, 119 N. C., 604. They had this remedy, in addition to the right of

applying to the reviewing board for a revision and correction of the assessments.

While it is not necessary to decide the question, it may well be doubted if, under section 30, chapter 558, of the Acts of 1901 an injunction will lie to restrain the collection of a tax because the valuation of property has been excessive or unequal. The party aggrieved seems to be afforded a plain legal remedy by that section in such a case.

The plaintiffs admit that the assessments for the years immediately prior to June, 1903, were fair, equal and uniform. If this be so, it would appear reasonable that the plaintiffs should be required to comply with the ordinary requirement or condition precedent to bringing an action to restrain the collection of a tax by paying, or at least tendering, what is justly due, which could have been approximately ascertained. In this respect the case is not unlike *Covington v. Rockingham, supra.* 2 Cooley on Taxation (3 Ed.), page 1425; *State Railroad Tax Cases*, 92 U. S., 575. *Judge Cooley* says: "Where an injunction has been applied for to restrain the collection of a tax, partly legal and partly not, the Court has made the payment of the legal tax a condition precedent; and it has been strongly intimated, in a case where it was alleged the assessment had by fraud been made too high, that the payment of what the party conceded would be his just proportion ought to be required before an injunction should issue, in order that the proceeding may be as little as possible injurious to the public interests." Cooley on Taxation, *supra.* It is but the familiar application of the universal rule that he who seeks equity at the hands of the Court must first do equity. In respect to this requirement, it has been said in a case not unlike this in principle that the plaintiffs resist the rule by which the value of their property was ascertained and then resist the tax. But surely they must pay the tax by some rule.

Should they pay nothing, and escape wholly because they have been assessed too high? These questions answer themselves. Before they seek the aid of the Court to be relieved of the excessive tax, they should pay what is due and do that justice which is necessary to enable the Court to hear them. It is not sufficient to say in their complaint that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due or what can be seen to be due on the face of the complaint. Surely something is due, and the State is not to be thus tied up as to that about which there is no contest by lumping it with that which is really contested. This is equity and is in accordance with the first principles of equity jurisdiction. *State Railroad Tax Cases, supra.* "Where the officers entrusted by law with the duty of making an assessment have fraudulently assessed property above its real value for the purpose of relieving resident tax payers from their due proportion of the taxes, and have not exercised their judgment upon the valuation, but have arbitrarily made an excessive assessment, while it would seem to be proper to enjoin a sale of land for the excess in such assessments, the injunction should not extend to the entire tax, and should only be allowed upon payment of the proportion which is justly due." 1 High, *supra* (3 Ed.), section 500; *Merrill v. Humphrey,* 24 Mich., 170. This was said in a case where it appeared there was no review or other method of relief provided by statute.

While we must deny to the plaintiffs the relief they seek in their complaint, they have made serious charges against those intrusted with the administration of this important branch of the law. It is true the charges are denied, but it yet remains to be said that the law should be so justly administered as to avoid even the appearance of wrong. The State has no right to require of the tax payer any more than his just proportion of the public burden in the way of tax-

ation, and any exaction which exceeds this limit and compels him to make a larger contribution than of right he should be called upon to make is of course unjust and unlawful, and the revising tribunals who are invested with the necessary power and jurisdiction should see to it that he is protected against any wrongful exaction arising out of the abuse of power, or the misconduct of subordinate officers. A fair assessment of property at its true value, with the lowest possible rate, is the true rule of taxation, for it is just to all and distributes the burdens uniformly. These remarks are general, and not intended as any intimation of opinion that the allegations of the complaint are true, for that matter is not now before us.

So far as it appears from the pleadings and findings the plaintiffs cannot prosecute this action with success. It must therefore be certified that there is no error in the ruling of the Court refusing to continue the injunction to the hearing.

No Error.

McCALL v. WEBB.

(Filed May 11, 1904).

1. GENERAL ASSEMBLY—*Remedies—Trial.*

The general assembly may abolish remedies and substitute new ones, or even without substituting any, if a reasonable remedy still remains.

2. OFFICERS—*Salaries and Fees—Former Adjudication—Damages—The Code, secs. 613, 616—Acts 1895, ch. 105—Acts 1899, ch. 49.*

The failure of plaintiff to recover fees and salary in the action adjudging his right to an office is a bar to a new and independent action for fees and salary.

3. QUO WARRANTO—*Officers—Parties—The Code, secs. 341, 616—Acts 1895, ch. 105—Acts 1899, ch. 49.*

An act allowing the prosecution of an action in the name of the state to assert the right of a citizen to a public office is not for that reason unconstitutional.

MONTGOMERY and DOUGLAS, JJ., dissenting.

ACTION by R. S. McCall against Chas. A. Webb, heard by *Judge W. A. Hoke,* at May Term, 1903, of the Superior Court of BUNCOMBE County.

The General Assembly by an act passed at its session of 1895 established the "Criminal Circuit Court of the counties of Buncombe, Madison, Haywood and Henderson," and the plaintiff was duly elected and qualified as Solicitor of the circuit for the term of four years. In 1897 the act was amended by adding the county of McDowell to the circuit. The Legislature at its session of 1899 repealed both of the said acts and subsequently at the same session established the "Western District Criminal Court," with jurisdiction in the said counties and others named in the act, and provided for the appointment of a Solicitor for each of the counties com-

posing the district. The defendant was appointed and qualified as Solicitor for the county of Buncombe and was installed in office.

The plaintiff thereupon brought an action in the nature of *quo warranto* against the defendant to test the validity of the act of 1899, which he alleged to be void, and in his complaint he states that the defendant has usurped and intruded into the office of Solicitor of the Western District Criminal Court for Buncombe County, and is unlawfully receiving the fees and emoluments thereof. He demands judgment that the defendant is not entitled to the office; that the plaintiff is so entitled; and for costs and for such other and further relief, etc. In his answer the defendant denies the plaintiff's right to the office, and, among other things not necessary to mention, avers that he is "in possession of said office lawfully and is lawfully entitled to receive and retain to his own use the fees and emoluments thereof." The plaintiff on filing his verified complaint applied to the Court by motion in writng for an order requiring the defendant to file a bond in the sum of $200, to be void upon condition that the defendant "shall pay to the plaintiff all such costs and damages, including the damages for loss of such fees and emoluments as may or ought to have come into his hands, as the plaintiff may recover in this action"; and he notified the defendant that "in default of the execution and filing of such undertaking the plaintiff will move for judgment for the recovery of said office and costs, and for judgment by default and inquiry for damages according to law." He afterwards moved that the defendant be required to increase the penalty of the bond to an amount not less than $400. Both motions were granted by the Court, and the defendant was required to give undertakings conditioned as above set forth in the plaintiff's written motion—one of them in the sum of $200 being executed by the defendant, with his

co-defendants, Rankin and Featherstone, as sureties, and the other in the sum of $300 by the defendant, with his co-defendant, Rankin, as surety. These undertakings were given in strict accordance with the Acts of 1895 and 1899 hereinafter mentioned.

Upon the coming in of the answer each of the parties moved for judgment upon the pleadings. The Court gave judgment for the plaintiff and therein declared him "to be entitled to the office and to perform the duties and to receive the emoluments thereof," and for costs of action. There is no reference in the judgment to the plaintiff's right to recover of the defendant any of the fees or emoluments of the office received by him, nor did the plaintiff ask for any reference or any inquiry to ascertain or assess his damages. The judgment was simply that he was entitled to the office, and that he recover possession of the same and his costs. To the judgment thus rendered the defendant excepted and appealed to this Court, which on November 21, 1899, affirmed the said judgment. 125 N. C., 243.

At November Term, 1899, of the Superior Court the plaintiff moved that the judgment of the last term in the *quo warranto* case be reformed so as to include an order for an inquiry as to his damages, and that a referee be appointed to take and state an account of the salaries, fees and emoluments received by the defendant. These motions were continued.

Afterwards, at February Term, 1900, the plaintiff moved that the judgment entered at November Term, 1899, be amended by inserting the words: "This cause retained for the purpose of an inquiry as to the damages which the relator may be entitled to recover of the defendant herein," and, second, that the plaintiff's complaint in that action be amended by inserting in it an allegation as to the unlawful and wrongful receipt of the fees and emoluments of the office

by the defendant to the amount of $700 and his refusal to account for and pay over the same to the plaintiff, together with a prayer for judgment for $700, the amount of said fees and emoluments and costs. The motions of the plaintiff were denied at February Term, 1900, and final judgment then entered according to the certificate of this Court. The plaintiff excepted and appealed and the judgment was affirmed by this Court. 126 N. C., 760.

The plaintiff thereafter, on November 29, 1899, brought this action against the defendant and his surety on the undertakings given in the former action to recover the fees alleged to have been collected by the defendant as Solicitor, amounting to $657.50, and the defendant pleaded the judgment in the former suit as *res judicata* and a bar to this action.

The matter was heard in the Court below upon a case agreed, the facts of which we have already substantially set forth.

The Court adjudged, upon the facts, that the plaintiff recover of the defendants the sum of $657.50, the full amount of the fees collected by the defendant Webb during his incumbency of the office, with interest and costs, the said judgment to be discharged as to the defendant Featherstone by the payment of $200 and interest to the day of the payment, and as to the defendant Rankin so soon as the payments amounted to $500 and costs then accrued. The defendant excepted to this judgment and appealed.

Frank Carter and *V. S. Lusk,* for the plaintiff.

Julius C. Martin, F. A. Sondley and *T. H. Cobb,* for the defendant.

WALKER, J., after stating the case. The question in this case is whether the plaintiff should have recovered his damages for the loss of the fees and emoluments of the office in the action in the nature of *quo warranto* in which his right

to the office of Solicitor was established, or whether he can maintain a separate action, such as this one is, and recover his damages therein. If he could only have his damages assessed by reference or inquiry in the first suit, it would seem perfectly clear that the judgment in that suit operates as *res judicata* and is a complete bar to his right of recovery in this case, as he permitted a final judgment to be entered in that action without having his damages assessed. Whether the remedy to have the damages assessed in the first action was exclusive of all other remedies and prevented the bringing of a separate action, as this is, for their recovery, depends upon the construction of our statutes upon the subject, because it cannot be contended with any hope of success that the Legislature did not have the power to provide that the plaintiff's damages should be assessed and recovered in the action brought to try the title to the office.

The right to a particular remedy is not a vested one, and while the Legislature cannot deprive a party of all remedy, the State has complete control over the remedies which it offers to suitors in its courts and may limit the resort to remedies. It may abolish old remedies and substitute new, or, even without substituting any, if a reasonable remedy still remains. Cooley Const. Lim. (7 Ed.), page 515, *et seq.* It was so held in *Parker v. Shannonhouse,* 61 N. C., 209, in regard to the repeal of the statute giving the remedy by *scire facias* (13 Edw. I., chapter 15, Rev. Code, chapter 31, section 109) to revive a dormant judgment, because the plaintiff still had the common law remedy by action upon the judgment. It has been held that laws changing remedies for the enforcement of legal contracts, or abolishing one remedy when two or more existed, may be perfectly valid, even though the new or the remaining remedy be less convenient than that which was abolished, or less prompt and speedy. Cooley, *supra,* 406. So that the power resided in

the Legislature to repeal the remedy by separate action for the recovery of damages from him who has been adjudged to have wrongfully intruded into an office and received the fees and emoluments thereof.

The functions of a court in respect to statutes are, first, to decide upon their constitutionality or validity, and second, to ascertain and declare their meaning.

Having decided as to the extent of the power and authority of the Legislature with respect to remedies, we will next consider what remedy it has given for the recovery of damages such as those claimed in this case.

It was provided by The Code, section 613, that in actions to recover the possession of an office "if judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover by action the damages which he shall have sustained by reason of the usurpation of the defendant of the office from which such defendant has been excluded." It was held under this section that compensation in damages for the loss of the fees and emoluments of the office could be recovered from the intruder who had received the same, in an action brought after the rendition of the judgment for money had and received to the relator's use. *Swain v. McRae,* 80 N. C., 111; *Jones v. Jones,* 80 N. C., 127; *Howerton v. Tate,* 70 N. C., 161. Section 616 of The Code, providing for expediting the hearing of cases brought to try the title to offices, was amended by the Act of 1895, chapter 105, section 1, by inserting the following:

"The defendant, before he is permitted to answer or demur to the complaint, shall execute and file in the Superior Court Clerk's office of the county wherein the suit is pending an undertaking, with good and sufficient surety, in the sum of $200, which may be increased from time to time in the discretion of the Judge, to be void upon condition that the

defendant shall pay to the plaintiff all such costs and damages, including damages for the loss of such fees and emoluments as may or ought to come in the hands of the defendant as the plaintiff may recover in the action." And section 1 of chapter 105 of the Act of 1895 was itself amended by the Act of 1899, chapter 49, by adding thereto the following:

"At any time after a duly verified complaint is filed alleging facts sufficient to entitle the plaintiff to the office, whether such complaint is filed at the beginning of the action or later, the plaintiff may, upon ten days' notice to the defendant or his attorney of record, move before the resident Judge or the Judge riding the district, at chambers, to require the defendant to give such undertaking, and it shall be the duty of the Judge to require the defendant to give such undertaking within ten days; and if the undertaking shall not be so given, the Judge shall render judgment in favor of the plaintiff and against the defendant for the recovery of the office and the costs, and judgment by default and inquiry to be executed at term for damages, including loss of fees and salary. Upon the filing of said judgment for the recovery of such office with the Clerk, it shall be the duty of the Clerk to issue and the Sheriff to serve the necessary process to put the plaintiff into possession of the office. In case the defendant shall give the undertaking, the Court, if judgment is rendered for the plaintiff, shall render judgment against the defendant and his sureties for costs and damages, including loss of fees and salary."

It will be observed that by the Act of 1895 the defendant is required to give an undertaking to secure to the plaintiff all costs and damages, including such fees and emoluments as may or ought to come into his hands and which the plaintiff may recover in the action. This language is perfectly clear and explicit, and leaves no room for doubt as to what is meant. If it is not expressed in so many words, it is

plainly implied that the plaintiff must recover his damages in the pending action for the recovery of his office, for the essential condition of the undertaking is "that the defendant shall pay all such costs and damages as the plaintiff may recover in the action," and these damages are secured by the undertaking, and if they are not paid by the defendant the sureties become liable for them. How can a plaintiff recover damages in an action unless they are assessed in that action. The expression "such costs and damages as the plaintiff may recover in *the* action" mean necessarily and *ex vi termini* that there must be a recovery of them in that action or not at all. The damages are to be recovered just as the costs, for they are associated together and put in the same catagory.

But if there were any uncertainty as to the meaning of that statute, all doubt would be removed by the Act of 1899, for it provides that "If the undertaking shall not be so given, the Judge shall render judgment in favor of the plaintiff, and against the defendant for the recovery of the office and the costs, and judgment by default and inquiry, to be executed at term for damages, including loss of fees and salary." And again: "In case the defendant shall give the undertaking, the court, if judgment is rendered for the plaintiff, shall render judgment against the *defendant* and his sureties for costs and damages, including loss of fees and salary." (Italics ours). A judgment by default and inquiry is taken always against the defendant and not against his sureties. They cannot be said to have defaulted, nor are the damages assessed against them but against the defendant, and they become liable for the amount so assessed to the extent of the penalty of their bond. But the second branch of the Act of 1899 is still more to the point and excludes any and all doubt as to what was meant. It is therein expressly provided that if the undertaking is given and the plaintiff recover, judgment shall be rendered against

the *defendant* (and of course his sureties) for costs and damages. This is a positive and unequivocal direction that judgment for any damages sustained by the plaintiff shall be rendered, if at all, in the action brought to try the title to the office.

These amendments in regard to the method of recovering damages in such cases do not provide for a cumulative remedy, but it was intended by them to substitute the remedy by inquiry in the action brought to recover the office for the former remedy by separate action on the undertaking, which was given by section 613 of The Code; and, besides, the amendments are inconsistent with the provisions of section 613, and the latter is therefore repealed by them. The amendments provide not only a sufficient and adequate remedy for the assessment of the plaintiff's damages, but one that is more expeditious and less expensive than a civil action. We do not think there is anything in the peculiar nature of the suit, nor in the fact that it is brought in the name of the State, that renders the mode of procedure prescribed by the amendments incompatible with the object or purpose of the suit. It is now an ordinary civil action prosecuted, it is true, in the name of the State, but in fact for the use and benefit of the relator, who is the real party in interest, or at least one of the real parties in interest, and he can assert all of his rights in the action. So far as the action affects his rights it is private in its nature. There is no constitutional objection to the amendments of 1895 and 1899 upon the ground that the action is prosecuted in the name of the State to assert the right of one of its citizens to a public office.

Having sustained the validity of the Acts of 1895 and 1899, and having shown from the wording of the acts that they require the damages to be assessed in the original action, we will now refer to some of the authorities upon the

latter question. In *Gold Co. v. Ore Co.,* 79 N. C., 48, the Court, construing section 192 of The Code of Civil Procedure (now section 341 of The Code), which required the damages to be ascertained by reference or otherwise, as the Judge shall direct, held that it was not contemplated that a separate action should be brought on the injunction bond, but that the damages should be assessed in the action in which the bond was given. To the same effect is *Crawford v. Pearson,* 116 N. C., 718, in which it is said the fact "that the defendant was sued alone in this action, and not his sureties on the injunction bond with him, makes no difference. The undertaking does not impose any new liability on the defendant but simply provides an additional security, therefore the damage which the plaintiff suffered, if any, should have been assessed in the same manner as if the sureties on the undertaking had been moved against, *i. e.,* in the same action in which the injunction was issued." In *Railroad v. Mining Co.,* 117 N. C., 191, it is held, approving the cases just cited, that when there is a final judgment against the plaintiff in the action, the defendant must "then and there lodge a motion for the assessment of their damages or else lose their remedy." But when there is an appeal, the motion must be entered not at or before the time of the appeal, but when, after the judgment of the appellate court is certified to the lower Court, the latter is about to enter the final judgment and before it is entered, otherwise the right to damages will be lost as in the other case, where there was no appeal.

It is contended that the cases of *McCall v. Webb,* 126 N. C., 760, and *McCall v. Zachary,* 131 N. C., 466, settle the principle that a separate action for the damages in cases like this may be brought and that it is the only proper remedy. We have read and carefully considered those cases, and, so far as they do so decide, we do not think that they

can be sustained. It is manifest that the Court overlooked the Acts of 1895 and 1899, which perhaps were not called to its attention. No reference to them is made by the Court, and in the discussion of the cases the argument of the Court proceeded altogether upon the idea that the action in the nature of *quo warranto* is of a public nature, which we think is erroneous. If such an action is instituted by the State alone, or by the State on the relation of a citizen, to inquire into the right of another to hold a public office, the action might be said to be of a public nature, but not so where one citizen sues another for the recovery of an office, although he uses the name of the State for the purpose. The distinction is clearly drawn in High on Ext. Leg. Rem., sections 629, 631 and 682, and is also recognized in The Code, sections 607, 608, 609, 610 and 613. But the suggestion is sufficiently answered by the fact that the Acts of 1895 and 1899 have distinctly provided that the damages shall be assessed in the original action, and it was clearly within the power of the Legislature so to provide.

In *McCall v. Webb,* 126 N. C., 760, it was held that the plaintiff's motions to amend the judgment and to amend the complaint were properly refused because, as they were made after the certificate of this Court had been sent to the Court below, that Court could not change or modify the judgment of this Court, and *Pearson v. Carr,* 97 N. C., 194, and several other cases, were cited in support of the ruling. The principle stated is undoubtedly a correct one, but we do not think it had any application to that case. Those cases apply only when the action of the Court below would introduce a new cause of action or new facts and thereby unsettle the decision and final judgment of the Court, and not to cases in which an order is made for the purpose only of carrying the judgment into effect. If *Judge McNeill* had granted the motions, he would not have changed or modified in the least

the former decision of the Superior Court or the decision of this Court. The judgment declaring McCall to be entitled to the office of Solicitor would have remained unimpaired. Perhaps the proper course to pursue is to move for an inquiry at the time the judgment is first entered, and then, if there is an appeal and the judgment is affirmed, the inquiry can be executed when the case goes back to the Superior Court, but if it is reversed, the order for an inquiry, being a part of the judgment, will be set aside with it. We do not mean by this to say that the motion for an inquiry cannot be made after the judgment of this Court is certified to the Superior Court. It may be that either course is open to the plaintiff. The ruling in *McCall v. Webb,* 126 N. C., 760, seems to be inconsistent with the decision in *Railroad v. Mining Co.,* 117 N. C., 191, which we have already cited and commented upon. In view of the plain and explicit provision of the statute as contained in the Acts of 1895 and 1899, we are unable to follow *McCall v. Webb,* 126 N. C., 760, and *McCall v. Zachary,* 131 N. C., 466, upon the question involved in this action. If the plaintiff was erroneously denied relief in *McCall v. Webb, supra,* he should have filed a petition to rehear, and if the decision was right he loses because he made his motions in the cause too late. In either case the judgment of the Superior Court in that action, which was affirmed by this Court, is a final determination of all matters which the law required to be litigated in it. The judgment is conclusive not as to all matters which might have been brought into it for litigation, but as to those which the law contemplates as actually involved in the case and presented for decision, and the cases must be thus understood. *Glenn v. Wray,* 126 N. C., 730; *Williams v. Clouse,* 91 N. C., 327; *Wagon Co. v. Byrd,* 119 N. C., 460. The plaintiff is concluded by the judgment in the original action of *McCall v. Webb* as to all claim for damages, including

the loss of fees and emoluments, upon the presumption of the law that they have either been waived by his not insisting on their recovery or that his right thereto has been adjudicated against. In no view of the matter can this action be maintained, as a party cannot resort to a new and independent action when relief can be had by proceeding in the original cause. Clark's Code (3 Ed.), page 855, where the numerous cases are collected. This is especially so when the law prescribes what the remedy shall be and how it shall be enforced.

It must be certified to the Superior Court that there is error in its judgment, which must be set aside, and judgment entered upon the agreed statement of facts dismissing the action.

Reversed.

Montgomery, J., dissenting. The plaintiff in this action brought a civil action in the nature of *quo warranto* against this defendant to recover the possession of the office of Solicitor in the Criminal Court of Buncombe County, and at August Term, 1899, of the Superior Court of that county recovered a judgment upon the complaint and answer. The defendant appealed to this Court and the judgment was affirmed. At the term of the Superior Court, when the certificate of the opinion and judgment of this Court was received, the plaintiff made two motions, the first for a reference to have ascertained the amount of fees and emoluments the defendant had received while he was wrongfully in possession of the office; and, second, for an amendment to his complaint to embrace a claim for such fees and emoluments. The motions were overruled, and upon appeal by the plaintiff to this Court it was decided that there was no error in the ruling. In the meantime, on November 25, 1899, the plaintiff had commenced the present action in the Superior Court of Buncombe County against the same defendant

(Webb) and the other defendants, J. E. Rankin and A. A. Featherstone, for the recovery of $657.57, which it is admitted was the amount of fees which the defendant had collected while in possession of the office of Solicitor of the Criminal Court of Buncombe County.

The defendants in their answer set up as a defense to the action of the plaintiff the plea of *res judicata*. They contend that by law the matters of complaint in the present action should have been heard and decided in the original *quo warranto* proceeding, and the plaintiff not having claimed the fees and emoluments of the office in that complaint in that suit, nor made a motion to have the fees and emoluments ascertained in that action, is precluded from making such demand against the defendants in a separate action. This question then is presented: Is the plaintiff in a *quo warranto* action for the recovery of an office compelled to have the damages, in the way of fees received by the intruder, assessed and ascertained in the same action? Or may he recover the office in the *quo warranto* proceeding and bring an action for the fees and emoluments in a separate action, if he sees fit to take that course? The answer to the question depends upon the construction of certain recent statutory law.

By the terms of section 616 of The Code, actions to try the right or title to any public office are required to be tried at the return term of the summons if the complaint shall have been filed and copy served with the summons ten days before the return day thereof, and the Judges are to expedite the trial of such actions and give them precedence over all other actions, criminal or civil. The Act of 1895, chapter 105, amended section 616 of The Code by adding these words: "The defendant, before he is permitted to answer or demur to the complaint, shall execute and file in the Superior Court Clerk's office of the county wherein the suit is

pending, an undertaking with good and sufficient surety in the sum of $200, which may be increased from time to time in the discretion of the Judge, to be void upon condition that the defendant shall pay to the plaintiff all such costs and damages, including damages for the loss of such fees and emoluments as may or ought to have come into the hands of the defendant, as the plaintiff *may recover in the action.*" (Italics ours). The General Assembly at its session of 1899 amended the above-mentioned act by adding to section 1 the following: "At any time after a duly certified complaint is filed alleging facts sufficient to entitle the plaintiff to the office, whether such complaint is filed at the beginning of the action or later, the plaintiff may, upon ten days' notice to the defendant or his attorney of record, move before the resident Judge or the Judge riding the district, at chambers, to require the defendant to give said undertaking; and it shall be the duty of the Judge to require the defendant to give such undertaking within ten days, and if the undertaking shall not be so given, the Judge shall render judgment in favor of the plaintiff and against the defendant for the recovery of the office and the costs, and judgment by default and inquiry, to be executed at term for damages, including loss of fees and salary. Upon the filing of said judgment for the recovery of such office with the Clerk, it shall be the duty of the Clerk to issue and the Sheriff to serve the necessary process to put the plaintiff into possession of the office. In case the defendant shall give the undertaking, the Court, if judgment is rendered for the plaintiff, shall render judgment against the defendant and his sureties for costs and damages, including loss of fees and salary."

The plaintiff in this action, after he had duly verified his complaint, twice moved before the Judge of the district to have bonds according to the statutes executed by the defendant to secure the fees and emoluments of the office. The

bonds were ordered, and one of them was executed by J. E. Rankin and A. A. Featherstone, defendants in this action, as sureties in the penalty of $200, and the other by Rankin as surety for $300. The condition in each of these bonds is that the bond shall be void if the makers shall pay to the plaintiff all such costs and damages, etc., as the plaintiff may recover of the defendant *in this action.* (Italics ours). These bonds were drawn in exact conformity to the statutes to which we have referred, and according to the language, its clear intent and meaning, and the meaning of the statutes themselves, no damages can be recovered on the bonds in the present action. The undertaking was that the makers should be liable on the bond only for such damages as might be recovered by the plaintiff *in the action in which the bonds were given.* The plaintiff did not see fit in that action to claim his damages and have them assessed, but of his own motion recovered a judgment upon the pleadings for the office simply. He must have known that, so far as the bonds were concerned, if he wanted damages he was required to recover them in that action.

I, however, think that the judgment below against the defendant Webb ought to be affirmed. I am satisfied that the extraordinary benefits and remedies furnished by the statutes referred to, to the plaintiff to secure to him the benefits of a recovery, were intended also to afford the sureties on the bond the advantage of having that part of the action which referred to the damages which the plaintiff was entitled to recover, settled speedily and in the same action. It was for the benefit of the sureties, and not for that of the intruder, that the statute required that damages should be assessed in the *quo warranto proceeding.*

In *quo warranto* proceedings, so far as the question of damages is concerned, against the intruding defendant, section 613 of The Code still applies. Its language is as fol-

lows: "If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover by action the damages which he shall sustain by reason of the usurpation by the defendant of the office from which such defendant has been excluded." That section of The Code does not require that a plaintiff in *quo warranto,* in his claim for damages, shall be compelled to recover them in that action. *Tate v. Howerton,* 70 N. C., 161. In that case it was decided also that an intruder who may perform the duties of the office and receive the fees arising therefrom cannot retain any part of the fees as a compensation for his labor. This case of course overrules that of *McCall v. Zachary* (a unanimous opinion of the Court), 131 N. C., 466, so far as they are in conflict. The statutes I have referred to in this case were not so critically examined by me in that case as they have been examined in this; and the argument for the defendant, too, before this Court in the present case was more elaborate and thorough than it was in that case.

Modified and Affirmed.

Douglas, J., concurs in dissenting opinion.

HILL v. GETTYS.

(Filed May 11, 1904).

1. CANCELLATION OF INSTRUMENTS—*Mortgages—Consideration—Equity.*

While a court of equity will not cancel a mortgage for lack of consideration, yet when a jury shall find that it was procured by fraud and fraudulent representations that the mortgagee would pay the consideration, a court of equity will grant the relief.

2. MORTGAGES—*Cancellation of Instruments—Fraud—Sufficiency of Evidence.*

In this action to cancel a mortgage for fraud, the evidence is sufficient to be submitted to the jury.

ACTION by J. L. Hill and others against P. E. Gettys and others, heard by *Judge E. B. Jones* and a jury, at January (Special) Term, 1904, of the Superior Court of RUTHERFORD County.

This is a civil action, invoking the equitable power of the Court to set aside a mortgage executed by the plaintiffs to the defendant C. C. Gettys, for that same was without any consideration and the execution thereof was procured by the false and fraudulent representations of the mortgagee. The defendant at the close of the plaintiffs' testimony moved the Court for a judgment of nonsuit, and upon the refusal to grant the motion the defendant introduced testimony, and at the close of the entire evidence renewed his motion, which was again refused. The defendant excepted. His Honor submitted the following issues to the jury:

1. "Did the defendant C. C. Gettys procure the execution of the mortgage or trust deed in controversy upon the false and fraudulent representation that he would pay off and discharge the Coxe and Gallert mortgages, or either of them, and did he fail to do so?"

2. "Was the mortgage or trust deed executed without consideration?"

The jury responded to both issues in the affirmative, and the Court upon the verdict rendered judgment directing the cancellation of the mortgage. The defendant appealed.

McBrayer & Justice, for the plaintiffs.
Eaves & Rucker, for the defendants.

CONNOR, J. The only assignment of error in the record is the refusal of his Honor to dismiss the action as upon nonsuit at the conclusion of the evidence. The testimony on behalf of the plaintiffs tended to show that W. S. Hill, Sr., the husband of the *feme* plaintiff, was indebted to Frank Coxe in the sum of about $85, to S. Gallert in the sum of about $55, and to the defendant P. E. Gettys in the sum of $360, subject to certain credits; that said debt was tainted with usury; that the several debts were secured by mortgage on the land of W. S. Hill, Sr., who was insane; that Coxe and Gallert held mortgages of prior date to that of the defendant; that the defendant went to the house of the plaintiffs and falsely represented to them that Coxe was about to foreclose his mortgage; that if the plaintiff, the wife of said W. S. Hill, Sr., and her children, would execute to him a mortgage on the land of said Mary H. Hill for the sum of $150, he (Gettys) would take up the Coxe and Gallert mortgages and cancel the same, applying the difference between the aggregate amount thereof to the credit of his mortgage; that upon said promise or representation the plaintiffs executed the mortgage in controversy; that thereafter the defendant purchased the Coxe and Gallert mortgages, but failed and refused to cancel the same or deliver them to the plaintiffs; that no other consideration than the said representation passed to the plaintiffs for the execution

of said mortgage; that W. S. Hill, Sr., died shortly thereafter, whereupon the defendant qualified as his administrator and immediately filed a petition for the sale of his land, setting up the two said mortgages as debts against his intestate's estate.

The defendant introduced testimony tending to contradict the contention of the plaintiffs, and to show that the purpose of the mortgage executed by the plaintiffs was to secure a credit on the debt of said W. S. Hill, Sr., to the defendant. He admitted that he bought the Coxe and Gailert mortgages, but denied that he did so with the proceeds of the mortgage in controversy.

A court of equity will not cancel a bond or mortgage simply because it is made without consideration. The party will be left to make his defense, in so far as it may be available, when an action is brought to enforce or foreclose the mortgage. Nor will a court of equity cancel a bond or mortgage because the obligee or mortgagee fails or refuses to perform or discharge some promise or agreement made at the time of its execution. Where, however, as the jury have found in this case, the execution of the bond or mortgage has been procured by the false and fraudulent representation that the obligee or mortgagee would discharge the obligation assumed, there is no reason why a court of equity should not grant relief.

A false and fraudulent representation or promise we understand to be one made with the intention in the mind of the promisor not to perform the promise. This is the misrepresentation of a subsisting fact, false within the knowledge of the party making it and calculated to deceive. Speaking of an actionable fraud, *Lord Bowen* in *Edington v. Fitzmaurice*, 29 L. R. Chan. Div., 459, says: "There must be a misrepresentation of a subsisting fact; but the state of a man's mind is as much a fact as the state of his diges-

tion. It is true that it is difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained, it is as much a fact as anything else. A misstatement as to the state of a man's mind is therefore a misstatement of a fact."

"The general rule in regard to promises is that they are without the domain of the law unless they create a contract, breach of which gives to the injured party simply a right of action for damages and not a right to treat the other party as guilty of a fraud. But that proceeds upon the ground that to fail to perform a promise is no indication that there was fraud in the transaction. There may, however, have been fraud in it; and this fraud may have consisted in making a promise with intent not to perform it. To profess an intent to do or not to do, when the party intends the contrary, is as clear a case of misrepresentation and of fraud as could be made. A promise is a solemn affirmation of intention as a present fact." 1 Bigelow on Fraud, 484. (The author is discussing of course civil remedies).

"When a promise is made with no intention of performing it, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense." *Goodwin v. Horne,* 60 N. H., 485.

"The intent is always a question for the jury, and to determine whether the intent was fraudulent the jury have necessarily to look to the circumstances connected with the transaction or those immediately preceding or following it." *Des Farges v. Pugh,* 93 N. C., 31, 53 Am. Rep., 446.

We think that for the purpose of disposing of the motion for nonsuit, there was evidence proper to be submitted to the jury. They have found that the promise was false and fraudulent. In the absence of any exception to his Honor's charge, we must assume that he explained to them the dis-

tinction between the failure to perform a promise honestly made and one made with the purpose not to perform, which is a fraud upon the party relying upon it, as an inducement for his action.

And as a mortgagee is a trustee, as held in *Bobbitt v. Stanton,* 120 N. C., 253, and cases therein cited, a court of equity will compel him to faithfully execute his trust or surrender the trust property. In this case the only purpose of the mortgage, as well as its sole consideration, was to take up the Coxe and Gallert mortgages. When the purpose failed, either through the inability or bad faith of the trustee, the trust was at an end, and we see no reason why the trustee should not be compelled to reconvey. Surely he should not be permitted to take advantage of his own wrong and convert to his own use property to which he held only the legal title and for which he had paid nothing.

To the suggestion that the plaintiffs have an adequate remedy by way of defense to an action to foreclose the mortgage, it is sufficient to say that equity will always relieve against a mortgage, which is a conveyance of the legal title with a clause of defeasance. If this were not true, the Act of 1893, chapter 6, a wise and most salutary statute, gives a remedy to remove a cloud from title created by the mortgage. The judgment must be

Affirmed.

WOMACK v. GROSS.

(Filed May 11, 1904).

1. DEPOSITIONS—*Exceptions and Objections—Waiver—The Code, secs. 1360, 1361.*

The failure to insert the name of the commissioner in the commission to take the deposition is waived by the objecting party appearing at the taking of the deposition and making no objection thereto until after the trial was begun.

2. DEPOSITIONS—*Admissions—The Code, sec. 1358.*

Where a deposition is rejected *in limine* for the reason that the name of the commissioner was not in the commission, it is not incumbent on the party offering the deposition to show why it should be admitted.

3. APPEAL—*Depositions—Admissions.*

An agreement by an appellee that a deposition should not be sent up in the case on appeal because not material to the decision, is an admission that a failure to send it up should not be prejudicial to the appellant, and in effect that the rejected evidence was material if wrongly rejected.

ACTION by Q. L. Womack against J. C. Gross, heard by *Judge E. B. Jones,* at January (Special) Term, 1904, of the Superior Court of RUTHERFORD County. From a judgment for the plaintiff, the defendant appealed.

McBrayer & Justice, for the plaintiff.
Eaves & Rucker, for the defendant.

CLARK, C. J. On objection by the plaintiff the Court refused to permit the deposition of Susan Gross to be read in evidence, on the ground that the name of the commissioner was not inserted in the commission. The defendant excepted. The commission was properly signed, sealed and issued, and

the plaintiff accepted service of the notice, which stated the time and place at which the deposition would be taken and the name of the commissioner. Before said commissioner the plaintiff appeared without exception and cross-examined the witness. The deposition was taken November 21, 1903, and the trial took place January 25, 1904. There was no exception to the deposition till after the trial began.

The Code, section 1361, provides how and when an objection on account of irregularity may be made. Section 1360 provides that no deposition shall be quashed for irregularity after a trial begins, where the deposition has been filed sufficiently long before the trial to permit objection to be made sooner. The irregularity in failing to fill in the name of the commissioner to whom the commission was issued, and who duly took and returned the deposition, was waived by the plaintiff appearing before him by counsel without exception and cross-examining the witness, and by not making any exception till after the trial was begun. *Willeford v. Bailey,* 132 N. C., 403, where the commissioner was not named in the notice; *Davison v. Land Co.,* 118 N. C., 369, where the commission was neither signed nor sealed; *Carroll v. Hodges,* 98 N. C., 419; *Woodley v. Hassell,* 94 N. C., 159; *Barnhardt v. Smith,* 86 N. C., 480; *Kerchner v. Reilly,* 72 N. C., 173.

The deposition having been rejected *in limine* for the reason given, it was not incumbent upon the defendant to put in evidence grounds under section 1358 for its admission, for that would have been a vain thing to do after the deposition had been already rejected as invalid. It is also true that when evidence is rejected, the party offering it should state its purport or send it up if written (as a deposition), that the Court may see that it was competent and relevant and that its rejection was injurious and not merely harmless error. *Straus v. Beardsley,* 79 N. C., 59. But the agree-

ment of the appellee that the deposition should not be sent up "because not material to the decision," is an admission that failure to send it up should not be prejudicial to the appellant, and in effect that the rejected evidence was material if wrongly rejected.

For the error in rejecting the deposition, there must be a New Trial.

DOUGLAS, J., concurring. I concur in the opinion of the Court upon the ground therein stated that "There was no exception to the deposition till after the trial began." I am very much influenced in this view by the reasoning of the Court in *Shutte v. Thompson,* 82 U. S., 151, where the deposition was taken before an officer not authorized by law. The Court said, on page 159: "It is to be observed that the objections made are all formal rather than substantial. Still they are quite sufficient to require the rejection of the deposition if there is nothing in the case to countervail their effect. But it is obvious that all the provisions made in the statute respecting notice to the adverse party, the oath of the witness, the reasons for making the deposition, and the rank or character of the magistrate authorized to take it, were introduced for the protection of the party against whom the testimony of the witness is intended to be used. It is not to be doubted that he may waive them. A party may waive any provision, either of a contract or of a statute, intended for his benefit. If therefore it appears that the plaintiff in error did waive his right under the act of Congress, if he did practically consent that the deposition should be taken and returned to the Court as it was, and if by his waiver he has misled his antagonist, if he refrained from making objections known to him at a time when they might have been removed, and until after the possibility of such removal had ceased, he ought not to be

permitted to raise the objections at all. If he may, he is allowed to avail himself of what is substantially a fraud. Parties to suits at law may assert their rights to the fullest extent, but neither a plaintiff nor a defendant is at liberty to deceive, either actively or passively, his adversary, and a court whose province it is to administer justice will take care that on the trial of every cause neither party shall reap any advantage from his own fraud."

In the case at bar it appears that the deposition was taken on the 21st day of November and that the trial took place on the 25th day of the following January. This apparently gave the plaintiff ample opportunity to examine the deposition and object to any irregularity of form or substance. I do not mean to say that a failure to object in proper time would validate a blank commission. Merely formal irregularities may be cured and substantial rights may be waived, but it is impossible to validate that which has no legal existence. The plaintiff's conduct does not have the legal effect of *creating* a commissioner, but is construed by the Court, in the furtherance of substantial justice, into a consent to the taking of the deposition under the circumstances under which it was taken. By withholding all objection when he knew the facts or by reasonable diligence might have known them, until it was too late to remedy defects which might otherwise have been remedied, he is deemed to have acquiesced. A void commission is essentially different from a defect in notice. The only object in the latter is to give the opposite party a reasonable opportunity of attending. If he actually attends and proceeds with the examination the object of the notice is attained. This is not so with other irregularities, which he generally has no means of knowing until after he does attend. Hence his attendance is not necessarily a waiver as to them, but even then he should assert his right

of objection in good faith and in due time. This seems to be the essential principle aimed at by section 1360 and 1361 of The Code.

ROBINSON v. GOLDSBORO.

(Filed May 11, 1904).

MUNICIPAL CORPORATIONS—*Bonds—Electric Company—Const. N. C., Art. VIII, sec. 4.*

Where the charter of a city provides that bonds for electric lights may be issued when submitted to and approved by the voters, the city cannot issue such bonds without such vote.

ACTION by J. J. Robinson and others against the city of Goldsboro, heard by *Judge W. R. Allen* at chambers, Goldsboro, N. C., April 16, 1904.

The city of Goldsboro was incorporated by chapter 397, Private Laws 1903. Among other corporate powers conferred by the charter, the city was authorized to establish a system of sewerage, water-works, electric lights, etc., and for that purpose to purchase the system of water-works and electric lights then in operation in said city. The Board of Aldermen, for the purpose of providing the means with which to establish or purchase and maintain the said system of water-works, etc., and for certain other purposes set forth in the charter, were authorized to issue bonds of said city, "as and when the Board of Aldermen may determine, * * * from time to time to an amount not exceeding in the aggregate the sum of two hundred thousand dollars and to issue said bonds for any of said purposes, or for two or more, or for all." By section 65 of the charter, it is provided that before any of the bonds provided for shall be issued, the proposition shall be submitted to the qualified voters at an

election." * * * The time and manner of holding the election are provided for. Pursuant to the provisions of the charter, an election was held and an issue of bonds voted, for the specified purposes, to an amount fixed at said election. An issue of bonds to the amount of $2,500 for the purpose of purchasing the electric light plant was approved, and bonds issued in accordance therewith. The total amount of bonds voted and issued was $110,000. On April 14, 1904, the Board of Aldermen adopted a resolution reciting in the preamble thereof the purchase of the electric light plant; that said plant was inadequate to supply the city with light; the public necessity for an increase of its capacity with additional machinery, fixtures, etc.; the inability of the city to furnish adequate light without contracting a debt for the purpose of enlarging and increasing the capacity of the plant, etc.

The plaintiff, in behalf of himself and all other tax payers of such city, seeks to enjoin the Board of Aldermen from issuing such bonds, for that the proposition has not been submitted to the voters of the city. The Court below granted the injunction and the defendants appealed.

F. A. Daniels, for the plaintiff.
A. C. Davis, for the defendant.

CONNOR, J. The defendants rely upon the decision of this Court in *Fawcett v. Mt. Airy,* 134 N. C., 125, to sustain their resolution to issue the bonds without the approval of the voters of the city. It is there held that, in the absence of any restrictive provision in the charter or by special or general legislation, the power may be conferred upon municipal corporations to contract debts and issue bonds for necessary expenses, and that furnishing light and water is a necessary expense.

The facts set forth in the pleadings in this case, however,

bring it directly within the principle announced in *Wadsworth v. Concord,* 133 N. C., 587. The charter expressly provides that bonds for the purpose set out may be issued to the amount of two hundred thousand dollars when the proposition has been submitted to and approved by the voters. The principle upon which that case is based is thus stated—quoting Dillon on Municipal Corporations, section 449: "Respecting the mode in which contracts by corporations should be made, it is important to observe that when, as is sometimes the case, the mode of contracting is specially and plainly prescribed and limited, that mode is exclusive and must be pursued, or the contract will not bind the corporation." The power to issue bonds for the purpose of establishing an electric plant (and we think this language includes making adequate provision for lighting the city) is expressly conferred subject to the approval of the qualified voters of said city. Certainly, until this power is exhausted, it excludes any other. It would be an idle thing for the General Assembly to prescribe the method by which and the terms upon which a municipal corporation could issue bonds, if, in disregard of such provisions it could proceed to do so. It is clearly within the power of the General Assembly to restrict, which of course includes the power to prescribe, the terms upon which it may be exercised. Const., Art. 8, section 4. The judgment must be

Affirmed.

DOUGLAS, J., concurring in result. In concurring in the result of the opinion of the Court, it is perhaps needless to say that, in view of the uniform decisions of this Court, and my fixed convictions of constitutional obligation, I would have dissented in *Fawcett v. Mount Airy* had I been present when the opinion was filed. My views have been so recently expressed in my concurring opinion in *Wadsworth v. Concord,* 133 N. C., 601, that it is useless to repeat them now.

JOHNSON v. REFORMERS.

(Filed May 11, 1904).

1. RECORDARI—*Appeal.*

Where a *recordari* is ordered as a substitute for an appeal, but is not docketed, the appellee has a right to docket the case and have it dismissed at any succeeding term of the court.

2. CONTRACTS—*Insurance.*

A mutual order for insurance cannot change its constitution subsequent to the contract with one of its members and to his detriment except by mutual consent.

3. CONTRACTS—*Burden of Proof.*

The burden of showing that a contract was changed by mutual consent is on the person alleging the same.

4. APPEAL—*New Trial—Verdict.*

Where a verdict is set aside for a supposed error of law, an appeal lies therefrom.

5. APPEAL—*Dismissal—Judgment—Exceptions and Objections.*

No appeal lies from a refusal to dismiss an action, but an exception should be taken and the trial proceeded with.

6. FOREIGN CORPORATIONS—*Domestication—Jurisdiction.*

A foreign corporation may be sued in this state though it has not been domesticated.

7. SERVICE OF PROCESS—*Waiver—Jurisdiction—Summons.*

Where a defendant asks for a *recordari*, he thereby waives a lack of service of summons.

ACTION by Nelson Johnson against the Grand Fountain of the United Order of True Reformers, heard by *Judge T. A. McNeill* and a jury, at September Term, 1903, of the

Superior Court of FORSYTH County. From a judgment for the defendant the plaintiff appealed.

Louis M. Swink and *J. S. Fitts,* for the plaintiff.
J. S. Lanier, for the defendant.

CLARK, C. J. Judgment was rendered before a justice of the peace September 30, 1902. The defendant took no appeal, but at December Term, 1902, on application to the Superior Court, obtained an order for a *recordari* and *supersedeas.* The defendant failed to give bond or to have the case docketed, either at that term or at the next succeeding term of the Superior Court, which was held in February, 1903. At the March Term the plaintiff moved to docket and dismiss. This was refused, and the plaintiff excepted. At the September Term, 1903, the *recordari* and *supersedeas* not having been yet docketed, the plaintiff again moved to docket and dismiss. This was refused and the defendant was allowed to docket the *recordari* and *supersedeas* at that term, and the plaintiff again excepted. A trial by jury was had, with verdict against the defendant, which the Court set aside on the ground that he had misdirected the jury to allow sick benefits, whereas, subsequent to the contract, the General Order had changed its constitution so as to provide that sick benefits should not be paid by the defendant, but by the subordinate lodges, and the plaintiff excepted.

There was error in both particulars. The *recordari* was granted as a substitute for an appeal, and not having been docketed, the plaintiff had a right to docket the case and have it dismissed at March Term, 1903, and also at September Term. Clark's Code (3 Ed.), page 731; *Brown v. Plott,* 129 N. C., 272; *Davenport v. Grissom,* 113 N. C., 38; *Ballard v. Gay,* 108 N. C., 544; *Boing v. Railroad,* 88 N. C., 62.

As to the second ground, the defendant could not change

its constitution subsequent to the contract, to the detriment of the other party, except by mutual consent. *Bragaw v. Lodge,* 128 N. C., 356, 54 L. R. A., 602, and this was not shown. It was error against the plaintiff to put the burden upon him to show that there was no consent to the change. The opposite was held to be the law. *Hill v. Life Asso.*, 128 N. C., 463; *Strauss v. Life Asso.,* 128 N. C., 465, 83 Am. St. Rep., 699; *Simmons v. Life Asso.,* 128 N. C., 469; *Bragaw v. Lodge,* 128 N. C., at page 357.

The Judge having set aside the verdict and granted a new trial for a supposed error of law, an appeal lies to review him. *Bryan v. Heck,* 67 N. C., 322; *Gay v. Nash,* 84 N. C., 335; *Thomas v. Myers,* 87 N. C., 31; *Wood v. Railroad,* 131 N. C., 48. The refusal to dismiss not being a final judgment no appeal then lay, and the plaintiff properly noted an exception, which brings the ruling up for review on this appeal. *Fertilizer Co. v. Marshburn,* 122 N. C., 411, and other cases cited in Clark's Code (3 Ed.), page 738.

The defendant's exception to the jurisdiction, taken in this Court, that the defendant is a foreign corporation and not domesticated here, hence cannot be sued here, is without merit. The summons was served on its agent. *Jester v. Packet Co.,* 131 N. C., 54. Even if there had been originally lack of service the defendant waived objection by coming into Court, asking for a *recordari* and trying the cause upon its merits. *Clark v. Mfg. Co.,* 110 N. C., 111. It would have been otherwise if the defendant had entered a special appearance and, that being overruled, had excepted and gone to trial. *State v. Johnson,* 109 N. C., 852.

The order setting aside the verdict and judgment is reversed. This renders it unnecessary to direct the dismissal of the *recordari.*

Reversed.

KISTLER v. WEAVER.

(Filed May 11, 1904).

1. INJUNCTIONS — *Personal Property—Insolvency—Pleadings—Acts 1885, ch. 401—Acts 1901, ch. 666.*

An injunction will not lie to prevent the removal of timber in the absence of an allegation of insolvency of the defendant.

2. INJUNCTIONS—*Personal Property.*

An injunction will not issue where the title to personal property is the sole question involved, there being adequate remedies at law.

ACTION by Wilson Kistler and others against A. D. Weaver and others, heard by *Judge T. J. Shaw,* at chambers, Morganton, N. C., January, 1904. From a judgment for the plaintiffs the defendants appealed.

Avery & Ervin, for the plaintiffs.
J. W. Pless and *Zebulon Weaver,* for the defendants.

WALKER, J. This action was brought to recover possession of a tract of land, and damages for a trespass committed thereon in cutting timber and removing from the land the cut timber and the lumber into which some of the timber had been sawed. Plaintiffs allege in their complaint that they are the owners of the land and entitled to the possession thereof, and that the defendants are in the unlawful possession of the same, and are unlawfully and wrongfully cutting and removing timber therefrom and also removing the lumber into which some of the timber had been sawed. There is no allegation of the insolvency of the defendants. Defendants in their answer denied the trespass and also denied the title of plaintiffs to the land and timber and trees, and especially denied their right to an injunction against removing the

lumber. Plaintiffs moved in the Court below for an injunction restraining the defendants from cutting or sawing any timber trees on the land, and further restraining them from removing any lumber sawed from any timber trees which had been cut on the land. The Court granted the injunction, providing, however, that, if the defendants gave bond payable to the plaintiffs with good and sufficient sureties in the sum of $600, conditioned to secure all such damages as the plaintiffs may recover in the action, they could remove any and all lumber sawed and manufactured from trees cut on the said premises, and if said bond is filed the injunction should not apply to the removal of the lumber. To so much of the order of the Court as restrained them from removing the lumber without giving bond as set forth in the order the defendants excepted and appealed.

A court of equity will not enjoin an ordinary trespass, such as entering upon land and working turpentine trees or cutting and making staves thereon, unless irreparable injury is threatened, that is, one for which there can be no sufficient recompense in money. It is therefore held that in such cases an averment of the defendant's insolvency is necessary, for if he is not insolvent, and the plaintiff can recover an equivalent in money for the loss sustained by the trespass, the damage cannot in any proper sense be called irreparable. *Gause v. Perkins,* 56 N. C., 177, 69 Am. Dec., 728; *Sharpe v. Loane,* 124 N. C., 1; *Lewis v. Lumber Co.*, 99 N. C., 11. By statute (Acts of 1885, chapter 401) it is provided, "That in an application for an injunction to enjoin a trespass on land it shall not be necessary to allege the insolvency of the defendant, when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees." This act, as construed, does not deprive the Court of the discretion to require a bond to be given by the defendant to secure plaintiffs' damages or to appoint a receiver, instead

of issuing an injunction. *Ousby v. Neal,* 99 N. C., 146; *McKay v. Chapin,* 120 N. C., 159. By the Act of 1901, chapter 666, it is provided that when there is a *bona fide* contention as to the title of the land or the timber trees thereon, no order shall be entered permitting either party to cut the trees, except by consent, until the title shall be determined, and that, if the claim of one of the parties is not asserted in good faith and based upon evidence establishing a *prima facie* title, then, upon the motion of the other party, if he shall satisfy the Court of the *bona fides* of his claim and produce evidence showing a *prima facie* title, he may be allowed by order to cut the timber trees upon giving bond as required by law.

The plaintiffs, in their brief, or citation of authorities, rely upon these acts and the cases in which they have been construed, but we do not perceive how they can have any bearing upon the particular question presented in this appeal. There was not only no exception to the order of the Court, so far as it enjoined the defendants from cutting the trees, but the defendants conceded the correctness of the order in that respect, as the plaintiffs had made out a *prima facie* case. The only exception is to that part of the order requiring the defendants to desist from removing the lumber, unless they first give a bond to secure any damages plaintiffs may sustain by the removal. The acts relate to the cutting of timber, and the order of the Court to the removal of lumber, so far at least as exception has been taken to it. Even if the plaintiffs could show a good title to the lumber, it would seem that he could not have the defendants enjoined from removing it, because they would have a plain and adequate remedy at law by action, with the ancillary proceeding in claim and delivery, to recover it, or they could recover the value of the lumber in an action for the conversion of it, if

they can show that they are the owners of it, a question which is not now before us for decision.

The courts will not permit a party to resort to the extraordinary remedy of injunction where there is a simple and ordinary remedy at law for the recovery of the property itself, and especially will such relief be denied when the plaintiff who applies for it is in no danger of suffering any loss by reason of the insolvency of the defendant.

An injunction will not issue when the title to personal property is the sole question involved. The question of title cannot be tried in that way. *Baxter v. Baxter,* 77 N. C., 118.

We were not informed upon what principle the ruling of the Court in this case proceeded, but, in any view that we have been able to take of the matter, the decision appears to us to be erroneous. The exception of the defendants is sustained.

Error.

HOLDER v. MFG. CO.

(Filed May 11, 1904).

1. HEARSAY EVIDENCE—*Exceptions and Objections—Appeal.*

Where hearsay evidence is admitted without objection and considered by the jury, an objection thereto will not be considered on appeal.

2. DAMAGES—*Malice—Master and Servant.*

In an action for damages for causing the discharge of an employee, actual malice need not be shown, it being sufficient if the act is done without legal excuse.

3. DAMAGES—*Master and Servant.*

In an action for damages for causing plaintiff's discharge by his employer, a charge that, if the same person was assistant manager of defendant and of plaintiff's employer, and of his own motion directed plaintiff's discharge, the jury should find for defendant, was properly modified by inserting before the concluding phrase, "without demand or direction of the defendant."

CONNOR and WALKER, JJ., dissenting.

ACTION by D. M. Holder against the Cannon Manufacturing Company, heard by *Judge T. A. McNeill* and a jury, at February Term, 1904, of the Superior Court of CABARRUS County. From a judgment for the plaintiff the defendant appealed.

Montgomery & Crowell and *M. B. Stickley*, for the plaintiff.

W. G. Means, for the defendant.

MONTGOMERY, J. The plaintiff brought this action to recover of the defendant damages for causing him to be discharged from the service and employment of the Gibson

Manufacturing Company. There was evidence to the effect that in June, 1903, the plaintiff was employed, and at that time was in the service of the Gibson Manufacturing Company, and that his work was satisfactory to the company, according to the testimony of W. E. Stafford, the boss of the weaving-room in which the plaintiff worked. The plaintiff testified that when Stafford discharged him he asked Stafford the cause of the discharge, and Stafford replied that he had had a letter from the Cannon Manufacturing Company and that that company wanted him discharged, but that he hated to do it. He also testified that B. A. Price, the superintendent of the Gibson Mill, told him that he had a letter from the Cannon Company and had to follow it. He said further that he asked Roberts, the boss weaver at the Cannon Mill, whether he or Barnhardt, assistant manager of the defendant, wrote the letter, and that Roberts made no answer. Price and Stafford both testified for the defendant that they had never received any letter from any person connected with the Cannon Mill in reference to the discharge of the plaintiff, and that they never said one word to the plaintiff about having received such a letter.

That evidence of the plaintiff was nothing but hearsay, and would not have been received if it had been objected to by the defendant. But not having been objected to it went to the jury as evidence, and there is no exception to it to be heard by us.

E. C. Barnhardt testified for the defendant that he was assistant manager of both the defendant company and the Gibson Company, and that he had the authority to discharge or have hands discharged; that he, as assistant manager of the Gibson Mill, had the plaintiff discharged of his own motion, without conference or suggestion from any officer or agent of the defendant company, and that there was no letter about discharging him. On cross-examination that

witness said that he discharged the plaintiff because he refused to make up some lost time at the Cannon Mill and he did not want that kind of a man at the Gibson Mill; that the plaintiff had gone out on a strike at the Cannon Mill, and that upon seeing his looms standing still he asked the plaintiff if he was sick, and he answered that he was not. The witness further testified that the defendant company is a different company from the Gibson Company, but that the general officers, managers and assistant managers are the same in both companies and attend to the business of each and both.

In the fourth allegation of the complaint it was alleged that the defendant company, through its officers or agents, while the plaintiff was in the employment of the Gibson Company, unlawfully, willfully and maliciously, for the purpose of injuring the plaintiff in his occupation and reputation, and of humiliating him and depriving him of the right to earn a living, conspired to have discharged and procured the discharge of the plaintiff from the employment of the Gibson Company by certain false and fraudulent representations. In the answer there was a general denial of that allegation.

On the trial the defendant undertook to show by evidence that it had no communication with or suggestion from the defendant company on the subject of the plaintiff's discharge from the employment of the Gibson Company, but that the Gibson Company acted in the matter solely and entirely upon information which came to Barnhardt, the assistant manager of the Gibson Company, by reason of his connection with the defendant company. Upon Barnhardt's testimony, the defendant could have asked the Court to instruct the jury that, as the contract between the plaintiff and the defendant was indefinite as to time, the defendant company would not be responsible for the discharge of the plaintiff, because of knowledge of the character of the plaintiff and of his conduct at the defendant's mill, acquired by Barnhardt as assistant

manager of both mills. But no such request for instructions was made by the defendant. The jury took the view, notwithstanding the testimony of Price, of Stafford and of Barnhardt, that no letter or communication had been received by the Gibson Company from the defendant on the subject of the plaintiff's discharge, that the plaintiff's testimony to that effect was true, and their verdict was rendered on that theory of the case.

The plaintiff's evidence tended to show that he was discharged without cause by the defendant company, and that he was discharged from the employment of the Gibson Company, while giving satisfaction in his work to that company, by a letter from the defendant demanding his discharge from the service of the Gibson Company, and upon that evidence, believed by the jury, the law applicable to the case seems to be clear.

In order to constitute malice in a case like the present it is not necessary that the defendant should show actual ill-will or hatred to the plaintiff, but it is sufficient if the act done, to the apparent damage of the plaintiff, is without legal excuse. Any person who, by any act causes the discharge of another from the service of a third party maliciously and willfully, that is, without lawful justification, is liable to the injured party for damages. *Haskins v. Royster*, 70 N. C., 601, 16 Am. Rep., 780; *Morgan v. Smith* 77 N. C., 37.

There was no exception to the charge of his Honor. The defendant asked the Court to instruct the jury to answer the first issue, "Did the defendant wrongfully and unlawfully cause the discharge of the plaintiff by the Gibson Manufacturing Company as alleged in the complaint? No." And the instruction was properly refused. Again the defendant asked for an instruction that, if the jury should find from the evidence that Barnhardt was the assistant manager of the Gibson Company, and as such manager had the right to direct

the discharge of the employees of the company, and as such manager, of his own motion, and in the exercise of his authority, directed the plaintiff to be discharged from the employment of the Gibson Company, whether such discharge was right or wrong, the jury will answer the first issue "No." His Honor, under the evidence in this case, added to the instruction the words "without demand or direction of the defendant," in connection with the right of Barnhardt to discharge the plaintiff from the employment of the Gibson Company. The addition was proper.

A further special instruction was asked by the defendant on the question of the duty of the plaintiff to satisfy the jury by a preponderance of the evidence that the defendant, through its officers and agents, unlawfully and maliciously caused the discharge of the plaintiff, which was given, except the following portion thereof, viz.: "And although the jury may find from the evidence that the Gibson Manufacturing Company discharged the plaintiff from its employment in consequence of representations made to it by the officers, agents and servants of the defendant, and he would not have been discharged except for such representations, yet if the jury further find from the evidence that such representations were true, they will answer the first issue "No." We think that his Honor committed no error in refusing to give that part of the instruction which we have quoted above. It is true that in the plaintiff's complaint there is an allegation that the defendant procured his discharge by conspiracy and by false and fraudulent representations to the Gibson Company, but such an allegation was not necessary or essential to the prosecution of the action by the plaintiff. It is sufficient that the act is alleged to have been done maliciously, willfully and unlawfully. *Jones v. Stanly*, 76 N. C., 355; *Haskins v. Royster, supra; Morgan v. Smith, supra.* The question was not whether the plaintiff was discharged by

reason of the false or fraudulent representations of the defendant, but was the discharge procured through malice, that is, without a lawful justification? The conduct of the plaintiff at the defendant's mill at the time he was discharged from the defendant's service was not such that the defendant could use with a subsequent employer to effect the discharge of the plaintiff. Furthermore, it did not appear on the trial what the representations in the letter were. The instructions asked and refused were based on the allegation in the complaint, and not on the evidence.

It is not to be understood by anything said in this opinion that one employer cannot inquire of another of the character and habits of a former employee of that other, and that an answer made in good faith and upon a knowledge of facts and acted upon by the recipient would subject the giver of the information to a suit in damages.

No Error.

CONNOR, J., dissenting. The plaintiff alleges that while he was in the employment of the Gibson Manufacturing Company, the defendant "unlawfully, willfully and maliciously, for the purpose of injuring the said plaintiff * * * did contrive, conspire and procure the discharge of the said plaintiff from the employment of the said Gibson Manufacturing Company, by certain false and fraudulent representations to the said Gibson Manufacturing Company." The only evidence tending to sustain the allegation is that of the plaintiff, in which he says that Stafford, the boss of the weave-room of the Gibson Company, told him that the defendant manufacturing company objected to his working there, and that he had a letter from the defendant company to discharge him. Passing by the objection that this was simply hearsay, there is not the slightest suggestion as to what officer, agent or employee of the defendant company wrote, or was

authorized to write, the alleged letter. There is not a scintilla of evidence tending to show that any letter was ever written by any officer or agent of the defendant company. On the contrary Stafford and Price, the employees of the Gibson Company, denied that they or either of them had seen such a letter, or that they ever said to the plaintiff that such letter had been written or received by them. E. C. Barnhardt, who was the assistant manager of the defendant company and of the Gibson Manufacturing Company, testified that he had the plaintiff discharged from the Gibson Company as the assistant manager of that company, and not of the defendant company; that he had him discharged of his own motion, without any suggestion from any officer or agent of the defendant company; that there was no letter about discharging him. There was not the slightest contradiction of this testimony.

Although the allegation made by the plaintiff is that the defendant unlawfully and maliciously procured his discharge, the issue submitted is confined to the *"wrongful and unlawful"* discharge of the plaintiff. Notwithstanding this form of the issue, the Judge below said to the jury: "You can also, if the charge was malicious, that is, intentional and willful, and without cause, and for the purpose of depriving the plaintiff of his job or service, award what are called punitory or exemplary damages for the wanton conduct of the defendant in bringing about the discharge, if by its servants and agents it did so." The objection to this instruction is found in the fact, first, that no issue was submitted to the jury in regard to the malicious conduct of the defendant, and next, because there was no evidence tending to show malice. It may well be that the defendant wrongfully and unlawfully procured the discharge of the plaintiff, without having done so maliciously or wantonly.

"The primary purpose of an action for damages is to

recover compensation for the actual loss or injury sustained. The liability for punitive or exemplary damages, however, being for the purpose of punishment, or as an example, rests primarily upon the question of motive. And the jury are not at liberty to go beyond the allowance of a compensation, unless it be shown that the act was done willfully, maliciously or wantonly, or was the result of a reckless indifference to the rights of others, which is equivalent to an intentional injury; and when there is no proof that the injury was so inflicted, exemplary damages should not be allowed." Joyce on Damages, section 119; *Wood v. Bank* (Va.), 40 S. E., Rep., 931; *Gilreath v. Allen,* 32 N. C., 67. The wrongful injury gives the right of action for compensation. The malicious, wicked motive gives the right to punitive damages. *Holmes v. Railroad,* 94 N. C., 319.

It is manifest that the jury awarded the plaintiff punitive damages because, on his own evidence, he was discharged about the 8th of August and got a regular job on the 14th of September. He testified that he earned $7.50 a week.

For the reasons pointed out, and others apparent upon the record, I am unable to concur in the conclusion reached by a majority of the Court. I think that, in any point of view, the defendant is entitled to a new trial.

WALKER, J., concurs in the dissenting opinion.

WESTBROOK v. WILSON.

(Filed May 11, 1904).

WILLS—*Undue Influence—Fraud—Instructions.*

In proceedings to probate a will, an instruction that if the devisees "influenced" the testator the finding should be for the caveators, is not ground for a new trial, in view of the entire charge of the court herein.

ACTION by J. F. Westbrook and others against Lottie Wilson and others, heard by *Judge E. B. Jones* and a jury, at January (Special) Term, 1904, of the Superior Court of RUTHERFORD County.

This was an issue of *devisavit vel non*, the caveators being the children and only heirs at law of the alleged testator. The propounders were the children of one Lottie Wilson, to whom the larger portion of the estate was given in the alleged will. The caveators alleged and introduced evidence tending to prove that their father at the date of his will was eighty-two years of age; that by reason of dissipation, sickness and old age, his mental and physical powers were so much impaired that he was incapable of making a valid will or other disposition of his property. That, if not legally incapable of doing so, he was the victim of fraud and undue influence exerted over him by Lottie Wilson, with whom he lived in an illicit relationship, and of her two sons, who were bastards, living in the same house. That the said Lottie Wilson, an unchaste, immoral woman, wielded an almost irresistible influence over him. That by reason of his age, condition of health and an accident sustained by being thrown from a mule, he was easily influenced by said Lottie Wilson, who had absolute control over him. The two sons of said Lottie were named as executors to the alleged will; that he was coerced and compelled to sign it by threats and other undue

influence of the said parties. The propounders, admitting the age and infirm condition of the alleged testator, denied that he was incapable of executing the will or that any undue influence or coercion was exerted over him. The usual issue was submitted to the jury, to which they responded in the negative, and from the judgment rendered thereon the propounders appealed.

McBrayer & Eaves, for the plaintiffs.
Eaves & Rucker, for the defendants.

CONNOR, J. The only exception and assignment of error in the record is directed to the eighth special instruction given in response to the prayer of the caveators, to-wit: "The burden is upon the caveators to establish fraud or undue influence, and in passing upon this question it is your duty to take into consideration the relation of the alleged testator to the devisees; his age and state of health at the time; the circumstances surrounding him, and the manner of disposition of such property; and if from all the circumstances surrounding the execution of the said paper-writing, you shall find that the said paper-writing was influenced by the beneficiaries, or any of them, then you will answer the issue No." The criticism of this instruction is to the use of the word "influenced" in the concluding sentence, in the absence of any qualifying word. The propounders say that thereby the jury were instructed to return a verdict in condemnation of the will if they found that the alleged testator was in any way, or to any extent, influenced to execute it by the propounders. The exception is well taken and must be sustained unless, as contended by the caveators, the error is rendered harmless by what is said in other portions of the charge. That a person may by proper influences be induced to make a valid disposition of his property is well settled. As if such influences

be addressed to his sense of justice, his affection, or his relation to other persons, there can be no possible valid objection, either in law or morals. The kind and degree of influence which the law denounces as undue, and therefore vitiating, are such as overrule and control, dominate and direct the mind and will of the person operated upon. *Wright v. Howe*, 52 N. C., 412. It is a fraudulent influence which controls the mind of the testator so as to induce him to make a will which he would not have otherwise made. *Marshall v. Flinn*, 49 N. C., 199.

The caveators make no contention in regard to the law, but direct attention to the entire charge of his Honor, and say that when read as a whole instruction it is impossible for the jury to have been misled by the failure at this point to use the word "undue" or some other appropriate term. It is settled that if a charge is contradictory in presenting material aspects of the law a new trial will be awarded. This must be so, because this Court cannot know to what extent the jury is misled or confused. *Williams v. Haid*, 118 N. C., 481. It is equally well settled that when reading the entire charge it is manifest that the jury could not in any reasonable view have misunderstood the real matter in controversy, or the law bearing thereon, a new trial will not be awarded. To the criticism made of the charge in *Lewis v. Sloan*, 68 N. C., 557, this Court said: "But upon a consideration of the instructions as a whole, we think they called the attention of the jury, as fairly as could be expected under the circumstances, to the material questions upon which they were to pass." The same rule is announced and followed in *Dills v. Hampton*, 92 N. C., 565, and *State v. Keen*, 95 N. C., 646.

His Honor's charge was very full and clear. There is no possible criticism to be made of it, certainly not by the propounders, except in the particular pointed out. He gave

the jury a full and clear statement of the contentions of the parties and of the testimony. He also stated correctly the definition and test of mental capacity requisite to make a will, and of what constituted such undue influence as would invalidate a will. He further said that "The caveators contend that if you should find that at all times the testator had sufficient mind to apprehend, understand and know the consequences of his act in making the will and disposing of his property, yet the evidence shows that the testator's mind was very weak and feeble; that his disease was such as to weaken his mind; that being weak in body and mind he was surrounded by the beneficiaries of the will, and that their influence, *domination and control over him were such as to put* him in fear, to coerce and influence and force his conduct in writing the will as it was made, and by these means the will of the testator was perverted from its free action or thrust aside entirely, and the will of the beneficiaries substituted for the will of the testator; the caveators must show to you by the greater weight of evidence that these infectious influences existed, and that they, the beneficiaries, were successful in procuring the making of the will as it was made. If you find as a fact from the evidence that the testator lived an adulterous life, cut loose and abandoned his children begotten in lawful wedlock, and lived entirely, or a greater part of the time, with Lottie Wilson, his mistress, treating her as his lawful wife and recognizing the children begotten by her as his offspring, these facts and circumstances alone would not be sufficient to show fraud, undue influence and coercion in making the will; but you may consider them along with other facts and circumstances in passing upon the question of fraud, undue influence and coercion, which is alleged by the caveators to have existed at the time of the execution of the will. If you find there was no fraud, undue influence, coercion or threats which procured the execution of the will,

and that the testator had mental capacity to make the will on the 24th of February, 1903, it would be your duty to answer the issue Yes."

We think that in view of this clear and explicit instruction in regard to the kind and degree of influence which would invalidate the will, the jury could not have understood his Honor to say, or to mean, that any other test should be applied to the will, or that they should disregard all that he had theretofore said to them upon that point. The language of *Mr. Justice Montgomery* in *Crenshaw v. Johnson*, 120 N. C., 270, is directly in point: "If the charge, on the whole, was not full and clear on the point to which the exception is directed, we would have no hesitancy in ordering a new trial for the reason set out in the exception. But upon reading the whole charge it is perfectly clear that on this point the jury could not have been misled. The language used by the Judge, when taken in connection with the balance of the charge, was so manifestly an inadvertence that it could have produced no harm." After a careful examination of the entire record we find no reversible error. While it is not our province to pass upon the verdict, we think that it is amply supported by the evidence sent up to this Court. We are not sure that his Honor should not have told the jury that if they found the facts in regard to the age, mental and physical condition, habits, etc., of the testator, coupled with his relations with Lottie Wilson and her sons, to be as contended by the caveators, the burden of proof would have been on them to rebut the presumption of undue influence. Wills made by men under such conditions and surroundings should be sustained only when it clearly appears that they are the offspring of a sound and disposing mind, free from the baleful influence of those who have obtained control of the maker. There is

No Error.

DOUGLAS, J., *dubitante.* I fear we are too much influenced in this case by its intrinsic equities, and that in our desire to prevent injustice we are ignoring those settled principles of law which experience has shown to be essential to the permanent administration of justice itself. It is always dangerous to stretch general principles too far to cover particular cases. A late eminent statesman, who was regarded as somewhat inflexible in his opinions, said that he was afraid to stretch a principle or a blanket too much at the edges, as he might split it down the middle.

This case goes beyond *Crenshaw v. Johnson*, 120 N. C., 270, because there the error and correcting portion of the charge were in a consecutive paragraph. I fear it comes within the rule laid down in *Edwards v. Railroad*, 129 N. C., 78, and 132 N. C., 99.

FIDELITY ASSOCIATION v. LASH.

(Filed May 11, 1904).

1. HOMESTEAD—*Judgments—Mortgages.*

In this action for the foreclosure of a mortgage the homestead should have been sold subject to the lien of a prior judgment.

2. JUDGMENTS—*Homestead—Mortgages.*

At a sale under a mortgage covering the judgment debtor's undivided interest in a part of the land afterward allotted to him, the purchaser took the property subject to the lien of the judgments.

3. FORECLOSURE OF MORTGAGES—*Sale—Judgments.*

In a foreclosure proceeding, in which all persons having an interest in the property were made parties, it was proper to move for a decree of sale under a judgment lien under which the property might have been sold without such decree.

4. PARTIES—*Executors and Administrators—Judgments.*

In an action to foreclose a mortgage, in which a sale under a prior judgment is asked, the personal representative and heirs of the judgment debtor should be made parties.

ACTION by the Fidelity Loan and Investment Company against Frank Lash and others, heard by *Judge T. A. McNeill,* at December Term, 1903, of the Superior Court of FORSYTH County. From the judgment there was an appeal.

Watson, Buxton & Watson and *L. M. Swink,* for the plaintiffs.

J. S. Grogan, for the defendants.

CLARK, C. J. On December 11, 1891, Frank Lash and Emma Alston were tenants in common of a lot of land in Winston, 200 feet wide by 100 feet deep, subject to the life estate therein of Amanda Lash. On that day a judgment before a justice of the peace was docketed against Frank Lash in favor of Vaughan & Pepper for $50.41 and costs, and three others in favor of Gilmer & Mahler, aggregating $496.68 and costs. In December, 1892, Frank and Emma and the life tenant gave a mortgage for $400, for money borrowed, to the plaintiff upon a strip fifty feet wide, running through the center of said lot. The life tenant having died in December, 1894, immediately thereafter there was a partition made, the strip about seventy feet wide on the east side of said lot being allotted to Frank Lash and the strip about seventy feet wide on the west side being allotted to Emma Alston, and the strip fifty feet wide, in the center, which had been mortgaged to the plaintiff, being left undivided. In the meantime, Frank Lash, in March, 1893, had mortgaged his undivided interest in part of said seventy-foot strip (afterwards allotted to him) to one Tyson to secure $125,

and in May, 1894, had mortgaged his undivided interest in the entire lot (200 by 100 feet) to one Brown to secure $500.

In January, 1895, execution issued against Frank Lash on the Vaughan & Pepper judgment. The homestead was allotted to him in the seventy-foot strip and his undivided interest in the fifty-foot strip was sold, under execution issued upon that judgment, for $75, and applied upon the Vaughan & Pepper judgment. Thus, Frank Lash's interest in the lot was reduced to the seventy-foot strip on the east side of said lot, upon which his homestead had been allotted, and against which there were outstanding the lien of the judgments in favor of Gilmer & Mahler, $496.68 and costs, docketed December 11, 1891, the mortgage for $125 to Tyson, March, 1893, and the $500 mortgage to Brown, May, 1894.

The plaintiff began this suit February, 1894, making the above judgment and mortgage creditors and Emma Alston co-defendants with Frank Lash, asking a sale of Emma Alston's interest in the fifty-foot strip under the mortgage, and that the various liens be adjusted and their rights settled. Proceedings were had which resulted in a sale of Emma Alston's undivided interest in the fifty-foot strip and application of the proceeds to the plaintiff's mortgage, and a judgment, July 2, 1898, decreeing that the three judgments of Gilmer & Mahler were the first lien upon the homestead tract of Frank Lash. That by reason of the sale under execution of the fifty-foot strip mortgaged to the plaintiff, the plaintiff, "under the doctrine of marshaling," was entitled to a lien upon the homestead of Frank Lash to the value of Frank Lash's interest in said fifty-foot strip, not exceeding $75, balance due on the plaintiff's mortgage, subject to prior lien of judgment creditors, and that the mortgages of Tyson and Brown were also liens; that none of these liens could be enforced till the termination of the homestead estate, and that Brown and Tyson could have a receiver

for the rents and profits to apply upon their several mortgages, which has been done ever since.

Upon motion, on notice issued December 6, 1899, it was ordered that the part of the homestead covered by the Tyson mortgage (made in March, 1893) should be sold subject to liens of judgment creditors. Upon the coming in of the report, the sale was confirmed and the defendants excepted. The receiver remained in possession. In July, 1903, Frank Lash, the homesteader died insolvent, and leaving neither widow nor child. A. F. Messick qualified as administrator, and at September Term, 1903, he joined with the judgment creditors in a petition filed in the cause to have a commissioner appointed and a sale of the homestead property, and application of proceeds in accordance with the terms of the aforesaid judgment of 1898. This motion being refused, the petitioners appealed and assigned as error the judgment of 1899 confirming the sale under the Tyson mortgage (which was excepted to at the time), and the refusal at September Term, 1903, to order a sale by a commissioner and application of proceeds to the judgment liens, and to make the administrator a party and to discharge the receiver.

The judgment of 1898, refusing to decree a sale under the mortgage, was based upon a mistaken conception of *Vanstory v. Thornton,* 112 N. C., 196, 34 Am. St. Rep., 483. The land should have been sold under the mortgage subject to the lien of the docketed judgment. The decree adjudging the plaintiff subrogated to a lien upon the homestead to the value of the undivided interest of Frank Lash in the fifty-foot strip, raises a question which is not here presented, unless, and until, under a sale of the property to pay the judgment liens, a surplus should arise whose application to the balance due upon the plaintiff's mortgage shall be contested by the holder of the Brown mortgage. The sale under the Tyson mortgage by the decree made upon the

motion, made in December, 1899, carried the property to the purchaser, subject to the lien of the judgments. The homestead having ceased, the judgment creditors might have sold under the judgment lien, but as all the parties who could be interested are in Court, the cause having been retained "for further orders," it was very proper to bring the case forward and ask for a decree of sale. *Harrington v. Hatton*, 129 N. C., 146. The administrator, representing creditors, should have been made a party, and also the heirs at law of Frank Lash, as there was a part of the homestead not covered by the Tyson mortgage, though their interest is remote, for if the judgments and interest should not exhaust the property, the Brown mortgage and the balance due upon the plaintiff's mortgage will be quite sure to do so.

The purchaser under the Tyson mortgage obtained only Tyson's title in the part of the homestead covered by that mortgage, leaving in force the Brown mortgage upon the other part of the homestead, and leaving intact the judgment liens upon the entire homestead tract, which liens are prior to both mortgages.

Error.

SMATHERS v. BANK.

(Filed May 17, 1904).

1. BANKS AND BANKING—*Corporations—Stock—Stockholders—Parties—Receivers—Acts 1897, ch. 298—The Code, sec. 668.*

A receiver for an insolvent bank is the proper party to bring an action against the stockholders to enforce their double liability.

2. BANKS AND BANKING—*Corporations—Receivers—Creditors' Bill.*

The better practice to enforce the double liability imposed on bank stockholders is to obtain the desired relief in a creditors' bill, where such has been brought, instead of an independent action by the receiver.

3. PARTIES—*Banks and Banking—Stockholders—Pleadings.*

While there is no necessity for joining creditors of a bank as parties plaintiff in a suit brought by the receiver to enforce the stockholders' double liability, such joinder is not prejudicial to the defendant.

4. BANKS AND BANKING—*Creditors' Bill—Stockholders—Pleadings.*

In an action by the receiver to enforce the double liability imposed on bank stockholders, the complaint should state the time when the several defendants became stockholders and when the debts were contracted.

5. BANKS AND BANKING—*Corporations—Stockholders—Acts 1897, ch. 298—Acts 1891, ch. 155—Acts 1899, ch. 164.*

Acts 1897, ch. 298, imposing on stockholders in banks a double liability, does not fix such liability for debts contracted prior to the enactment of the statute, but does apply to stockholders of banks organized before the passage of the act.

ACTION by George H. Smathers and others against the Western Carolina Bank and others, heard by *Judge B. F. Long;* at March Term, 1904, of the Superior Court of BUNCOMBE County. From a judgment for the plaintiffs, the defendants appealed.

Jones & Jones, for the plaintiffs.

Merrimon & Merrimon and *Moore & Rollins,* for the defendants.

CONNOR, J. This action, in the nature of a bill in equity, was brought by George H. Smathers, Receiver of the Western Carolina Bank, in which a number of creditors in behalf of themselves and all other creditors of said bank joined, against the bank and certain stockholders thereof for the purpose of enforcing the statutory liability imposed upon the stockholders for the indebtednes of the bank by chapter 298, Public Laws 1897. The complaint sets forth the incorporation and organization of the bank, the names and number of shares held by each stockholder and date of becoming such stockholder, and the failure of the bank. It further sets forth the institution in the Superior Court of an action by certain creditors, in the nature of a creditors' bill, and the appointment of the plaintiff as receiver. The order of the Court is attached to and made a part of the complaint. It is in the usual form and contains the following provision: "It is further ordered that the said receivers take into their charge all the property and assets of the said defendant corporation, and that they shall proceed at once to the collection of all debts due to the said corporation defendant, and take all such necessary and legal steps for the purpose of such collection, hereby giving to the said receivers full power and authority, in their names as such, to institute and prosecute to final judgment all such suits and actions at law and equity as may be necessary for the purpose of reducing the choses in action and other evidences of debt into possession, and collecting the same," etc. The original order appointed two receivers; one of them resigned, leaving said Smathers sole receiver. Thereafter an order was made in said cause substituting W. W. Jones, Esq., receiver in place of said

Smathers. He was made party plaintiff, and an amended complaint was filed setting forth the order of substitution and adopting the original complaint. It is alleged that the total assets of the bank will not pay to exceed fifty per cent. of its indebtedness. The defendants demurred to the complaint and assigned as grounds of demurrer:

1. That the action should have been brought by the creditors of the bank in their own right; that the receiver has no cause of action, etc.

2. That the action should have been brought by the creditors against each individual stockholder.

3. That there is a misjoinder of plaintiffs and defendants.

4. That relief should have been sought in the original action.

5. That it does not appear upon the face of the complaint whether the defendants became stockholders before or after the passage of the Act of 1897, chapter 298, nor when the alleged debts were created or contracted.

6. That it does not appear that the assets of the bank have been exhausted, or that any liability has arisen against the defendants under said Act of 1897.

7. That the act is unconstitutional, for that it is *ex post facto* and retroactive, impairs the obligation of contracts, etc.

8. That no power is conferred upon the receiver to bring the action.

His Honor overruled the demurrer and allowed the defendants time to answer. Defendants appealed.

The Act of 1897, by which it is sought to attach the liability of the defendants, was ratified March 6, 1897. It provides that the stockholders of every bank or banking association, now operating by virtue of any charter or law of this State, or that may hereafter operate, "Shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and agreements of such association to

the extent of the amounts of their stock therein, at the par value thereof, in addition to the amount invested in such shares." By section 2 any exemption from personal liability contained in any charter is repealed. The Code, section 668, provides that when any corporation is insolvent, the Judge of the Superior Court having jurisdiction, as fixed by The Code (chapter 10), may appoint a receiver to take charge of the estate and effects thereof and to prosecute all such actions, either in his own name or the name of the corporation, as may be necessary or proper, etc. Whatever may have been the law in respect to the right of the receiver to prosecute actions for the recovery of the assets, debts and property of the corporation prior to the change in our judicial system, blending the legal and equitable jurisdiction and power into one tribunal and form of action, it is well settled now, as said by *Burwell, J.,* in *Davis v. Mfg. Co.*, 114 N. C., 321, 23 L. R. A., 322: "In *Gray v. Lewis*, 94 N. C., 392, it was decided that as well because of the change in the system of our courts, as because of the statute, the receiver might sue either in his own name or that of the corporation. In whichever name he may elect to bring the action, it is essentially a suit by the corporation prosecuted by order of the Court for the collection of the assets. * * * In it may be adjudicated all the rights of the bank, its creditors and the defendant debtor, both legal and equitable, pertaining to the matters set out in the pleadings, and such judgment may be entered as will enforce the rights of the general creditors, and also protect any equities that the defendant may be entitled to," etc. The statute, The Code, section 668, expressly extends the life of the corporation for three years after dissolution for the purpose of winding up its affairs. The doctrine that the capital stock of a corporation constitutes a trust fund has been accepted and acted upon by this Court. *Foundry Co. v. Killian,* 99 N. C., 501, 6 Am. St. Rep., 539;

Cotton Mills v. Cotton Mills, 115 N. C., 475; *Bank v. Cotton Mills,* 115 N. C., 507.

"It is a favorite doctrine of the American courts that the capital stock and other property of a corporation are to be deemed a trust fund for the payment of the debts of the corporation," etc. 10 Cyc., 553. The same authorities conclusively settle the doctrine that unpaid subscriptions to stock constitute a part of the assets of the corporations, and are to be sued for and recovered in the same manner as other assets, certainly to the extent that they are necessary for the payment of its debts. Judge Thompson, in his very able and exhaustive article on "Corporations," 10 Cyc., says that the remedy for the recovery of such unpaid subscriptions is, in the absence of any statutory provision in equity, that when for any reason it becomes necessary to afford an effective remedy a court of equity will direct suit to be brought by the directors or by "its own proper officers." Pages 655-6. Does the liability of the stockholders imposed by the Act of 1897 come within the same principle as unpaid subscriptions? It certainly does in respect to the purpose for which it is imposed and to give the securities to creditors which it designs. It simply incorporates into the contract of subscription the additional obligation that, if necessary to pay the debts of the corporation, the subscriber will pay an amount in addition to his subscription equal to the par value of his stock. This obligation is to the corporation in trust for the security of its creditors. It is difficult to see in what respect it differs from the promise to pay the amount of his stock, so far as the right of the creditor is concerned, except in the order of liability. The corporation may not, as against creditors or other stockholders, relieve him from the obligation. *Marshall Foundry Co. v. Killian, supra.* The corporation, or those representing or succeeding to its rights and remedies, should collect all unpaid subscriptions

before resorting to the additional statutory liability, which is secondary to the right to demand payment of the subscription. The receiver represents and, in a certain sense, succeeds to the rights of the corporation. We can see no valid reason why he may not, representing the corporation and its creditors, bring any and all actions in respect to its assets, or rights of action, which it or its creditors could have brought The exact question raised by the demurrer is presented and decided in *Wilson v. Brook*, 13 Wash., 676. The constitutional provision in that State is the same as the Act of 1897. The opinion by *Hoyt, C. J.*, discusses and settles the question. We have no hesitation, after careful examination, in adopting his reasoning and conclusion. He says: "But if this fund is secondary, and for the benefit of all the creditors of the corporation, it can be reached only by a proceeding in equity for the benefit of such creditors, and since, under our statute, the receiver of an insolvent corporation represents its creditors as well as the corporation itself, and can reach all the assets of the corporation for the purpose of satisfying the claims of creditors, there is no reason why the additional liability of stockholders should not, under the direction of the Court, be enforced by such receiver for the benefit of such creditors, and the expense and annoyance incident to the prosecution of another action be voided. All the other property of an insolvent corporation is a trust fund for the same purpose, and there is no reason why trust funds for a single purpose, though derived from different sources, should not be collected and administered in the same proceeding. * * The receiver when appointed takes possession of all the property of the corporation for the benefit of all its creditors; and it should be held that he has the right, under the direction of the Court, to enforce every liability, of whatever nature, which the Court may find it necessary, to fully protect the rights of creditors. In this way all creditors

share alike, and the entire affairs of the corporation, including the adjustment of the liabilities of its stockholders, will be subject to the control of the Court in a single action, and unnecessary delay and expense prevented." The case was approved in *Watterson v. Masterson,* 15 Wash., 511, in which it was held that after the appointment of a receiver of an insolvent corporation an action could not be maintained by creditors to enforce the statutory liability of the stockholders. While there is some divergence of opinion in the different courts in respect to the right of creditors to maintain separate actions upon the statutory liability, we are of the opinion that it is more consonant with principle and convenience of procedure to recognize the right of the receiver to bring the suit, wherein all parties in interest are represented and complete relief afforded. This view disposes of the first and second grounds of demurrer. In respect to the third ground of demurrer, while we see no necessity for joining the creditors as parties plaintiff, no harm can come to the defendants therefrom.

The fourth ground of demurrer is based upon the suggestion that relief should have been sought in the original action, or creditors' bill. There is much force in the contention, and we can see no good reason why, upon motion, the cause should not be consolidated with the original action. In winding up the affairs of an insolvent corporation it is best that, as nearly as may be, the Court having original jurisdiction bring all parties interested in the final decree before it, and to the end that their rights and equities be adjusted and administered. The usual and better practice is to have an assessment upon the stockholders made by the Court upon an ascertainment from the report of the receiver, and notice issued to each stockholder to show cause why such assessment should not be enforced. The Act of 1891, chapter 155, in regard to winding up the affairs of insolvent

banks, as amended by the Laws of 1899, chapter 164, transferring to the Corporation Commission the power and duties conferred upon the Treasurer, contemplates this procedure. While, as we have seen, the receiver may recover the amount due from the stockholder, he should be permitted to do so only upon its appearing that there is a deficit in the other assets of the bank, and he should recover only such amount as may be necessary to cover such deficit. It is within the power of the Court to make such assessment. *Langston v. Upton*, 91 U. S., 56; *Hawkins v. Glenn*, 131 N. C., 319. It may be that it would be wise to confer upon the Corporation Commission having charge of the management of banks the power to make such assessments after the manner provided in the National Banking Act by which the Comptroller does so. The plaintiff will probably encounter practical difficulties in working out a final judgment in this case—many of which would be avoided if the action is consolidated with the original action, wherein he may make his report to the Court showing the amount necessary to collect from the stockholders, and have an assessment based thereupon. *Von Glahn v. Harris*, 73 N. C., 323. The fifth ground of demurrer should be sustained. The complaint should be so amended that the defendants will be advised in respect to the time when the several defendants became stockholders, if the list attached to the complaint does not do so, and the dates when the debts were contracted. The sixth ground of demurrer cannot be sustained. The Act of 1897 expressly fixes the liabilty unless, for the reasons hereinafter stated, the name of the defendants come within the provisions of the statute. The sixth ground is based upon the theory that no action against the stockholders can be maintained until the assets are "completely exhausted." This cannot be sustained. Whenever it appears that the assets will be insufficient, we see no reason why the receiver may not proceed to enforce

the liability. The extent of it cannot be absolutely fixed until the status of the assets and debts has been ascertained.

The seventh ground of demurrer presents the question, for the first time in this Court, whether, under the power reserved by Article VIII, section 1, of the Constitution to amend or repeal charters, the stockholder can be made individually liable for the debts of a corporation by an amendment to the charter, or a general statute, passed subsequent to the charter and subscription to the stock. This is a question of very great importance to the holders of stock in banking and other business corporations in this State. The facts stated in the complaint in respect to the status of the defendant stockholders and date of the contraction of the debts are so meager that we prefer to decide the question only to the extent clearly presented. While the Legislature has not seen fit to attach such personal liability to stockholders in other than banking corporations, the power conferred by the Constitution is not confined to them. It is well settled that statutes attaching such liability are in derogation of the common law and should be strictly construed. 10 Cyc., 665, citing *Gray v. Coffin*, 9 Cush., 192; *Brunswick Ter. Co. v. Bank*, 192 U. S., 386. We hold that the statute should not be so construed as to fix such liability upon stockholders for debts or contracts contracted or made prior to the amendment of the charter, or the statute. The subscription of stockholders constitutes the contract, and the extent of the liability as to debts already incurred is fixed by the terms of the charter as they then exist. Any change in the charter in this respect must be construed to operate prospectively only. It is well settled that such liability as the stockholder assumes is contractual. *Whitman v. Bank*, 176 U. S., 559. Thus construed, we find no constitutional objection to the Act of 1897. His Honor's ruling upon the demurrer, as modified and limited herein, is

Affirmed.

LANCE v. BUTLER.

(Filed May 17, 1904).

1. SALES—*Conditional Sales—Recordation—The Code, sec. 1275.*

Where a firm agrees to sell goods for a part of the profits, it is not a conditional sale and need not be registered.

2. SALES—*Agency—Trusts—Commissions.*

The proceeds of sales made by an agent are a trust fund in the hands of the agent, except as to his commissions for selling.

3. PARTNERSHIP—*Contracts.*

An agreement whereby one is to receive part of the profits of an enterprise as a means only of ascertaining his compensation does not create a partnership.

4. PARTNERSHIP—*Mortgages.*

A partner has no authority, without the consent of the other partners, to mortgage firm property for his own debt.

5. CONVERSION—*Mortgages—Issues.*

Where one not the owner of goods gave a mortgage thereon, and the true owner sued the mortgagee in conversion, a request for an issue as to whether plaintiff was damaged by the sale, and, if so, how much, was proper.

6. CONVERSION—*Interest—Damages—The Code, sec. 530.*

In an action for damages for conversion the jury may allow interest on the amount of the damages from the time of the conversion.

7. CONVERSION—*Interest—Judgments—Damages—The Code, sec. 530.*

In an action for damages for conversion, the verdict being the value of the property at the time of the conversion, interest can only begin from the time of the judgment.

8. CONFUSION OF GOODS—*Agency—Sales.*

Where one who was an agent for another for the sale of goods mixed such goods with his own stock of goods, the title of his principal attached to the whole stock until the value of his goods were returned to him or properly accounted for.

9. CONFUSION OF GOODS—*Mortgages.*

Where one who was the agent for the sale of goods for another allowed them to be mixed with his stock of goods, and then gave a mortgage on the entire stock, the mortgagee obtained no better title than the mortgagor had.

10. INSTRUCTIONS—*Witnesses—Issues.*

A contention that the court erred in giving undue prominence to the testimony of one particular witness was without merit, where his name was mentioned in the charge but once, and that on an issue which was answered as a proposition of law under an instruction of the court.

ACTION by F. A. Lance against G. W. Butler, heard by *Judge E. B. Jones* and a jury, at December Term, 1903, of the Superior Court of BUNCOMBE County.

The plaintiff entered into the following contract with Hunter & Lance:

NORTH CAROLINA—Buncombe County.

"This instrument of writing, witnesseth, that I have this day and with these presents do hereby consign to Z. T. Hunter and M. E. Lance, partners trading and doing business at Mills River, North Carolina, in Henderson County, under the firm name and style of Hunter & Lance, a certain stock of goods, wares, merchandise, books, accounts, choses in action and effects, together with the fixtures, including safe, show cases, scales, spool-cotton cabinets, etc., now in the store formerly occupied by T. C. Hunter & Co., at Arden, Buncombe County, N. C., and also one two-horse wagon now in the blacksmith shop of Clayton & Reagan, at Arden, N. C., being all the property this day conveyed to me by Frank Carter, trustee.

"This consignment is made upon the following terms and conditions, to-wit: The said Hunter & Lance are to sell the

goods in the course of their business for cash, at figures not less than the cost of the same to me, to-wit: One thousand and sixty-two and 52-100 dollars, the proceeds as they arise from the sale of said goods to be paid to me or my order until the said cost, to-wit, $1,062.51, is fully paid and discharged.

The balance of the proceeds arising from the sale of said goods, if any there shall be, to be paid as follows: One-half to me and one-half to be retained by said Hunter & Lance as their compensation for selling and disposing of the same.

"The title to said goods hereby consigned is to remain in me, and said goods shall be kept separate from the general stock of said Hunter & Lance, so that they may at any and all times be fully identified as the goods hereby consigned.

"Interlineation in the 27th line of the first page of this instrument made before signing.

"Witness my hand and [seal], this December 17, 1892.

"F. A. LANCE, (Seal).

"Witness: FRANK CARTER."

"We hereby agree to receive, hold and dispose of the property consigned to us by the foregoing instrument, upon the conditions and for the purposes therein set forth.

"HUNTER & LANCE.

"Witness: FRANK CARTER."

Subsequently Hunter & Lance removed the goods to Greenville, S. C., where Z. T. Hunter executed a chattel mortgage to secure his individual indebtedness to the defendant, under which they were sold, the plaintiff being present and forbidding the sale. This action is to recover damages for the conversion. From a judgment for the plaintiff the defendant appealed.

Jones & Jones, for the plaintiff.
Zebulon Weaver, for the defendant.

CLARK, C. J. The real controversy is upon the second exception, that the contract above set out, by which the plaintiff consigned the stock of goods, etc., to Hunter & Lance, was a conditional sale, and therefore invalid as to the defendant under The Code, section 1275, because not registered. In a conditional sale the transfer of title to purchaser or retention of it by him depends upon the performance of some condition. 6 Am. & Eng. Ency. (2 Ed.), 437. Here the title to the goods was not passed to Hunter & Lance, but they were merely agents to sell the goods, remitting proceeds to plaintiff. They were to keep the goods separate and apart so as to be identified and the title was to remain in the plaintiff. After remitting $1,062.52 of the proceeds, as received, to plaintiff, half of the balance of the proceeds were to be retained by Hunter & Lance as their compensation for selling and disposing of the goods. This was a mere agency, not a conditional sale, and registration of the instrument was not necessary. In *Drill Co. v. Allison,* 94 N. C., 548, an agreement was held an agency to sell, though less clearly so than in this case, and though it was expressly styled therein a conditional sale. It is clear, in this case, that the goods were not sold to Hunter & Lance, but they were to sell them to the public as agents for the plaintiff, and after collecting and sending the plaintiff, out of sales, the amount he had paid for the goods ($1,062.52), one-half of the balance of sales were to be retained by the agents as their compensation for selling. The proceeds of sales were a trust fund in the hands of Hunter & Lance, except as to the commissions for selling. *Brewery Co. v. Merratt* (Mich.), 9 L. R. A., 270; 6 Am. & Eng. Ency. (2 Ed.), 450.

In *Kootz v. Tuvian,* 118 N. C., 393, it is held that while an agreement to share profits, *as such,* is one of the tests of a partnership, an agreement to receive part of the profits for his services and attention, as a means only of ascertain-

ing the compensation, does not create a partnership—citing to that effect, *Mauney v. Coit,* 86 N. C., 463; *Fertilizer Co. v. Reams,* 105 N. C., 296. But even if this had been a partnership between the plaintiff and Hunter & Lance, Hunter had no power, without the consent of the other partners, to mortgage the firm property for his own debt (*Hartness v. Wallace,* 106 N. C., 427), and it can make no difference whether the mortgagee knew that it was partnership assets or not. *Rogers v. Batchelor,* 12 Pet., 229, and citations of that case collected in 3 Rose's Notes, 728.

The defendant properly asked that the third issue should be, "Was the plaintiff damaged by said sale; if so, how much?" Had it been submitted in that form, the jury in their discretion could have allowed interest from the date of the conversion. *Stephens v. Koonce,* 103 N. C., 266. In the form actually submitted, "What was the value of the goods sold by the defendant under his mortgage?" the jury responded "$300." Upon this, it was error to allow interest except from the date of the judgment. The Code, section 530. Besides, the date of the conversion, "February 6, 1895," as stated in the judgment, is not found by the verdict. This error, however, does not call for a new trial, but the judgment will be reformed so that the $300 shall bear interest only from the date of the judgment. The error in the form of the issue not having been prejudicial to the defendant, his exception cannot be sustained. It is not merely error, but error in a material matter, and shown to be prejudicial to the appellant, which can justify the order for a new trial.

The defendant further insists that as the goods were not kept separate, but were mixed by Hunter & Lance with their own, the plaintiff cannot recover. But, as is said in *Wells v. Batts,* 112 N. C., 291, 34 Am. St. Rep., 506, "the party who occasions, or through whose fault or neglect occurs the

wrongful mixture must bear the whole loss." By the mixing, the title of the plaintiff attached to the whole of the stock of Hunter & Lance until the value of the plaintiff's goods was returned to him or properly accounted for, and the defendant by his chattel mortgage could obtain no better title than his mortgagor possessed.

It is further contended that the Court erred in unduly stressing the testimony of one particular witness, but the witness' name is mentioned in the charge but once, and that upon the first issue, "Were the goods consigned to Hunter & Lance?" and that issue, the defendant admits, should be and was answered as a proposition of law under the instruction of the Court upon its construction of the written agreement.

The exceptions in the record, other than those above stated, are not set out in the brief, and are without merit. The judgment will be modified by allowing interest only from the trial.

Modified and Affirmed.

WEEKS v. QUINN.

(Filed May 17, 1904).

DESCENT AND DISTRIBUTION—*Executors and Administrators—The Code, sec. 1281.*

Where one is survived by his daughter and widow, and the daughter inherits an estate from him and dies before the widow, the heirs of the widow, and not those of the husband, inherit the estate, and it is immaterial whether the daughter or widow were in possession.

ACTION by J. D. Weeks and others against J. H. Quinn, heard by *Judge B. F. Long,* at November Term, 1903, of the Superior Court of RUTHERFORD County. From a judgment for the defendant the plaintiff appealed.

Eaves & Rucker and *Morrow & Smith,* for the plaintiff.
Quinn & Hamrick, for the defendant.

MONTGOMERY, J. Under the common law the fifth of the rules or canons of inheritance was that on failure of lineal descendants, or issue of the person last seized, the inheritance shall descend to his collateral relations being of the blood of the first purchaser; and rule first was an inflexible one that inheritance should never lineally ascend. By our statute of 1808, ch. 739, Rev. Stats., ch. 38, Rules 4 and 6, changes were made in respect to those two rules of descent under the common law. The fourth canon of descent in chapter 38 of the Revised Statutes provides that on failure of lineal descendants, where the inheritance has been transmitted by descent, * * * the inheritance shall descend to the next collateral relations of the person last seized *who were of the blood* of such ancestor; and in rule 6 there is a general provision that where the person last seized shall have left no issue nor brother nor sister nor the sister of such,

the inheritance shall vest for life only in the parents of the intestate or in either of them, if one only be living, and on the death of the parents, then to the survivor, and afterwards be transmitted according to the preceding rules. That proviso was amended as appears in the Revised Code so as to vest the inheritance absolutely in the father if living, and if not then in the mother if living, whether of the blood of the ancestor from whom the land descended or not. That is the law as it is now written in The Code in the proviso in rule 6 of the chapter on descents.

The very question now before us is that which was before the Court in the case of *McMichael v. Moore,* 56 N. C., 471, and the same principle is decided in *Kincaid v. Beatty,* 98 N. C., 340, and *Early v. Early,* 134 N. C., 258. The Court in *McMichael v. Moore* said: "This general provision in favor of the father and mother expressly departs from the principle of keeping the inheritance in the blood of the first purchaser, which for feudal reasons was strictly adhered to by the common law, and which is retained in our statutes in regard to collateral relations, except for the purpose of preventing an escheat. The parents are by the statute looked upon as lineal relations in the ascending line, and in respect to them the common law principle is put entirely out of the way. Under the statute now in force the inheritance vests absolutely in the father, if living although he is not of the blood of the ancestor from whom he land descended. No words could make the intention of the law-makers plainer than those used. In the Revised Statutes, chapter 38, the provision was that in such cases the inheritance should vest in the parents for life only, with the right of survivorship; as amended, the inheritance vests in the father if living, absolutely, but in both statutes there is the same disregard of the blood of the first purchaser or ancestor from whom the land descended.

In the case before us, submitted under section 567 of The Code, it appears that William Weeks died intestate in 1901, seized and possessed of the lands described in the case submitted, leaving a widow, Alpha, and a daughter, Willie Belle. The daughter died in the life-time of the mother, Alpha. The defendant J. H. Quinn qualified as administrator of Alpha, the widow of William Weeks, who had after his death intermarried with one Butler, and has commenced a special proceeding in the Superior Court of Rutherford County to subject the land and assets to pay the debts, and for partition among the heirs at law of his intestate, Mrs. Butler. The action was commenced by the plaintiffs, who are the heirs at law of William Weeks, from whom the land descended to his daughter, Willie Belle Weeks, and the defendants (besides Quinn, the administrator) are the next of kin of Mrs. Butler, formerly the widow of William Weeks.

As we have already said, the case of *McMichael v. Moore, supra*, is controlling here. Willie Belle, the daughter of the intestate William Weeks, by the death of her father and the inheritance being cast upon her by the event, became the *propositus* or stock from whom the inheritance lineally ascended to her mother. It is immaterial who was in the actual possession of the land—whether Willie Belle, the daughter, or Alpha, the mother—for the reason that by rule 12 of the chapter on descents in The Code it is declared that "every person in whom a seizin is required by any of the provisions of this chapter shall be deemed to have been seized, if he may have any right, title or interest in the inheritance." The Court below gave judgment that the defendants are the owners of the land and that they recover possession thereof. There is no error in that ruling.

Affirmed.

SETZER v. DEAL.

(Filed May 17, 1904).

1. NEGOTIABLE INSTRUMENTS—*Bills and Notes.*

The knowledge by the *bona fide* assignee of a note of the crookedness in business matters of the assignor does not defeat the title of the assignee or make it his duty to enquire relative to the note.

2. NEGOTIABLE INSTRUMENTS.

That the maker of a note does business near the assignee is immaterial on the question as to whether the assignee was a *bona fide* holder.

ACTION by Setzer & Russell against A. A. Deal, heard by *Judge T. J. Shaw* and a jury, at November Term, 1903, of the Superior Court of CATAWBA County. From a judgment for the defendant the plaintiffs appealed.

E. B. Cline and *D. L. Russell,* for the plaintiffs.
Self & Whitener and *T. M. Hufham,* for the defendant.

PER CURIAM. All the evidence was to the effect that the defendant executed two notes to the Deering Harvester Company, one in the sum of $50 and the other in the sum of $55, for an "Ideal Binder," sold by that company to him; that those notes were destroyed in the presence of the defendant by Yoder, and that thereupon the defendant executed the note sued upon in this action. Yoder claimed to be one of the firm of the Hickory Implement Company and testified that he endorsed the same to the plaintiffs for value. The defendant attempted to prove that Yoder and the plaintiffs conspired to cheat the Deering Harvester Company by destroying the evidence of the indebtedness of the defendant to that company, and in taking the note of the defendant for

the amount. There is abundant evidence in the case going to show that Yoder practiced a fraud upon the Deering Harvester Company in the transaction, but we can see from the evidence only one suspicious circumstance tending to prove the complicity of the plaintiffs in the matter, viz., that according to the defendant's testimony, after the plaintiffs alleged they bought the note sued upon, the defendant called upon the plaintiffs and asked them if they had bought the note from Yoder, and, if so, what they paid for it, and they declined to answer the questions. That was, as we have said, after the alleged purchase of the note. The defendant, with the purpose to show that the plaintiffs were in possession of such facts as should have put them on inquiry as to the title of Yoder to the notes sued on, asked Setzer, one of the plaintiffs, if he did not know at the time of the transfer of the notes that there were charges against Yoder of crookedness in business transactions. And the witness was further asked, for the same purpose, if he tried to find out anything else about the note, and further, if he knew the Hickory Implement Company did business next door to the plaintiffs. The witness was compelled to answer that he had heard there were some charges against Yoder; that he did not make inquiry about the note or the plaintiffs' title to it, and that he did know that the Hickory Implement Company conducted business next door to the plaintiffs. We are of the opinion that the evidence was incompetent. The defendant had executed the note. It was not due when it was transferred, and the plaintiffs had testified that they had given $100 for it and knew nothing nor had heard anything to its dishonor; and the defendant had introduced no evidence in contradiction. The purchase of the notes seems to have been made for value, in good faith and in due course of business. Any knowledge on the part of the purchaser of the assignor's crookedness in business matters could not be allowed to defeat the rule of

law which gave to a purchaser of a note for value, in good faith and in regular course of business, the title to the property. It would be almost impossible for the business of banking to be carried on if it was incumbent that bank officers, whenever negotiable paper was offered for discount or sale, to inquire into whether any of the parties to be charged were crooked in their business methods.

We cannot see what connection the fact that the Hickory Implement Company did business next door to the plaintiffs could have to do with the matter. Neither in fact nor in law did it have any connection with the matter. We see nothing in the evidence, as we have said, which put the plaintiffs upon notice to look into or find out anything about Yoder's right to the note. "What circumstances will amount to actual or constructive notice of any defect or infirmity in the title to the note, so as to let it in as a bar or defense against a holder for value, has been a matter of much discussion and of no small diversity of judicial opinion. It is agreed on all sides that express notice is not indispensable, but it will be sufficient if the circumstances are of such a strong and pointed character as necessarily to cast a shade upon the transaction and to put the holder upon inquiry." Story Prom. Notes, section 197. The same principle of law was held in *Loftin v. Hill,* 131 N. C., 105.

New Trial.

COGDELL v. TELEGRAPH CO.

(Filed May 17, 1904).

1. TELEGRAPHS—*Negligence.*

The failure to notify a sender of a telegram of the non-delivery thereof is evidence of negligence.

2. TELEGRAPHS—*Negligence—Burden of Proof.*

Proof or admission that a telegraph company received a message for transmission, and failed to deliver it to the sendee within a reasonable time, makes a *prima facie* case of negligence, and imposes on the company the burden of alleging and proving such facts as it may rely on in excuse.

3. TELEGRAPHS—*Negligence—Burden of Proof.*

The misspelling of the name of the sendee of a telegram does not relieve the telegraph company from the burden of showing that it could not have delivered the message with the exercise of reasonable diligence.

ACTION by C. M. Cogdell and wife against the Western Union Telegraph Company, heard by *Judge W. H. Neal* and a jury, at October Term, 1903, of the Superior Court of MECKLENBURG County. From a judgment for the plaintiffs the defendant appealed.

Maxwell & Keerans, for the plaintiffs.

Jones & Tillett and *F. H. Busbee & Son,* for the defendant.

DOUGLAS, J. This is an action brought by the *feme* plaintiff to recover damages for mental anguish alleged to have been suffered by her on account of her failure to attend her father's funeral, which she would have attended but for the negligence of the defendant in failing to deliver a

telegram informing her of her father's death. The telegram was as follows: "Mount Airy, N. C., Nov. 3, 1902. Mrs. Frank Codgell, Charlotte, N. C. Your father died suddenly this morning. W. F. Martin."

It is admitted in the complaint that the name of the sendee in the message was misspelled "Codgell," instead of "Cogdell," as it should have been. The mistake was caused by transposing the two letters g and d.

The assignments of error include thirty-nine exceptions. Thirty-two of these, referring to the admissibility of evidence become practically immaterial in the view we take of the case. The exceptions to the refusal of prayers and to the instructions as given, aside from the usual defensive prayers for nonsuit and direction of the verdict, are substantially included, in principle at least, in the following prayer: "That the defendant company having received a telegram for transmission addresed to Mrs. Frank Codgell was under no obligations to find, or attempt to find, the *feme* plaintiff and deliver the message to her, and the jury are therefore instructed to answer the first issue 'No.'" The record states that the defendant introduced no testimony.

In discussing the points involved in this case, we will not attempt to follow the order of the exceptions, but will state the general principles as they suggest themselves. It is well settled that a telegraph company is in the nature of a common carrier, and, subject to reasonable regulations, is required to receive and promptly transmit and deliver all messages tendered in good faith. It may require prepayment, but if it accepts a message without such requirement it is held to the same degree of care and diligence as if the proper charges had been prepaid. If for any reason it cannot deliver the message, it becomes its duty to so inform the sender, stating the reason therefor, so that the sender may have the opportunity of supplying the deficiency, whether

it be in the address or additional cost of delivery. The failure to notify the sender of such non-delivery is of itself evidence of negligence. Proof or admission that the company received a message for transmission and failed to deliver it to the sendee, within a reasonable time, raises a *prima facie* case of negligence, and imposes upon the defendant the burden of alleging and proving such facts as it may rely on in excuse. In the case at bar it clearly appears that a message was received by the defendant which was intended for the plaintiff, although her name was misspelled by the transposition of two letters. The defendant did not prove or even allege any effort whatever to deliver the message. There is no evidence that it was sent to Charlotte, nor was any notice given to the sender of its non-delivery until eight or ten days after it was received for transmission. Apparently not even then would such notice have been given had not the sender called at the office and inquired what had become of the message. We think the defendant must lie under the burden which it made no attempt to lift or shift. Under these circumstances the plaintiff was not required to prove affirmatively the negligence of the defendant, or, what is equivalent thereto, that the defendant might have found the sendee by proper diligence. It follows that whatever error there may have been in the admission of evidence tending to prove that fact was immaterial and harmless in view of the legal presumption to the same effect. If any evidence had been introduced by the defendant to rebut the presumption so as to raise a question as to the relative *weight* of the evidence, the case would be different.

The above principles are too well settled by the decisions of this Court to require any citations from other jurisdictions.

The presumption of negligence from the acceptance and non-delivery of a telegram is held in the following cases:

Sherrill v. Telegraph Co., 116 N. C., 655; *Hendricks v Telegraph Co.,* 126 N. C., 304, 78 Am. St. Rep., 658; *Laudie v. Telegraph Co.,* 126 N. C., 431, 78 Am. St. Rep., 668; *Rosser v. Telegraph Co.,* 130 N. C., 251; *Hunter v. Telegraph Co.,* 130 N. C., 602.

In Sherrill's case this Court says, through *Clark, J.*, on page 656: "The plaintiff having shown the delivery of the message to the defendant, with the charges prepaid (and it would have been the same if the defendant had accepted the message with charges to be collected), and the failure to deliver the message, a *prima facie* case was made out, and the burden rested on the defendant to show matter to excuse its failure."

In *Hendricks v. Telegraph Co.,* 126 N. C., 304, this Court says, on page 309: "It is well settled that where a telegraph company receives a message for delivery and fails to deliver it with reasonable diligence it becomes *prima facie* liable, and that the burden rests upon it of alleging and proving such facts as it relies upon to excuse its failure."

The same language is quoted with approval in *Laudie v. Telegraph Co.,* 126 N. C., 431, 436.

In *Rosser v. Telegraph Co.,* 130 N. C., 251, the Court below charged the jury as follows: "If you find from the evidence that the message was delivered to the defendant with the charges prepaid, and you further find from the evidence that the defendant failed to deliver the message, a *prima facie* case is made out, and the burden would then rest on the defendant to show matter to excuse its failure." In approving this instruction this Court, through *Cook, J.*, says, on page 255: "The message having been shown by the testimony, and also admitted in the answer, to have been received by defendant and the charges prepaid, it then became its duty to deliver it to the addressee at the point to which it was addressed. If, however, that could not be done, then

it was incumbent upon defendant to show that it had performed its part of the contract in exercising due diligence in endeavoring to do so."

"All of the facts relating to the transmission of the message were within the possession of the defendant, and it did not choose to disclose them to the Court and jury. From the very nature of telegraphy, neither the sender nor sendee could personally know what became of the message, or why it was not received at its destination, or, if received, why not delivered."

That a telegraph company is in the nature of a common carrier, owing certain duties to the public irrespective of a personal contract, is held in *Cashion v. Telegraph Co.*, 124 N. C., 459, 45 L. R. A., 160; *Laudie v. Telegraph Co.*, 124 N. C., 528. In the former case this Court says, on page 466: "One other principle must be kept in view: A telegraph company is in the nature of a common carrier. Claiming and exercising the right of condemnation, which can be done only for a public purpose, it is thereby affected with a public use. It owes certain duties to the public which are not dependent upon a personal contract, but which are imposed by operation of law. A simple contract is an agreement between two parties, a drawing together of two minds to a common intent, and must be voluntary as well as mutual. Whenever a man, at a proper time and place, presents a telegram to the company for transmittal, and at the same time tenders the proper fee, the company is bound to receive, transmit and deliver it with reasonable care and diligence. It cannot refuse to receive it, and while it may protect itself by reasonable regulations, it cannot insist upon a personal contract contrary to its usual custom or to public policy. As was said in *Reese v. Telegraph Co.*, 123 Ind., 294, 7 L. R. A., 583, the failure of the telegraph company to promptly deliver a telegram "is not a mere breach of contract, but

a failure to perform a duty which rests upon it as the servant of the people."

In *Laudie v. Telegraph Co.,* 124 N. C., 528, this Court says, on page 533: "Moreover, the defendant as a common carrier, owed to the plaintiff a public duty which it should have performed with reasonable care and diligence. It cannot be relieved from liability for the proximate results of its own negligence, if it existed, by unreasonable regulations or technical objections."

That it is the duty of the telegraph company to promptly inform the sender of a message when, for any reason, it cannot be delivered, is held in *Hendricks v. Telegraph Co.,* 126 N. C., 304; *Laudie v. Telegraph Co.,* 126 N. C., 431; *Bright v. Telegraph Co.,* 132 N. C., 324; *Hinson v. Telegraph Co.,* 132 N. C., 467, and *Bryan v. Telegraph Co.,* 133 N. C., 603.

In *Hendricks v. Telegraph Co.,* 126 N. C., 304, this Court says, on page 311: "We think that it is the duty of the company, in all cases where it is practical to do so, to promptly inform the sender of a message that it cannot be delivered. While its failure to do so may not be negligence *per se,* it is clearly evidence of negligence. In many instances by such a course the damage could be greatly lessened, if not entirely avoided. A better address might be given, mutual friends might be communicated with, or even a letter might reach the addressee. In any event, the sender might be relieved from great anxiety and would know what to expect. Moreover, it would tend to show diligence on the part of the company."

This language is quoted with approval in Laudie's case.

In Hinson's case, *Connor, J.,* speaking for the Court, says: "Viewed from this standpoint, the defendant had in its possession a message addressed to M. L. Hinson with no direction as to place of residence other than the city of Columbia,

S. C. Its duty upon this state of facts was to use every reasonable effort to find and deliver the message to the sendee, and, upon failure to do so, to ask for a better address."

This would dispose of the case, provided there had been no mistake in the spelling of the name of the sendee. In any event, we do not think that such a mistake would relieve the defendant from the burden of showing that it could not have delivered the message with the exercise of reasonable diligence. The defendant does not allege any effort whatever on its part, but contends that the misspelling of the name relieved it from any such obligation. This contention cannot be sustained upon any legal principle.

Suppose a telegraph company were to receive a prepaid message addressed to a well-known resident named Brown, could it justify itself in keeping both the money and the telegram without any effort whatever to deliver, simply because the addressee happened to spell his name Browne? If the company was unable after reasonable diligence to deliver the message on account of the misspelling of the name, it should set those facts up in defense. This would then invoke the doctrine of *idem sonans*, and raise a question of fact, to be determined by the jury, as to whether the correct spelling of the name and that used in the message were sufficiently similar in sound to suggest to the average telegraph operator the identity of the sendee. We do not mean to say that the similarity of sound must be sufficient to absolutely fix the identity of the addressee, but that it must be such as to enable the employees of the company at the terminal office to find the addressee with reasonable search and inquiry. In the case at bar this question was properly left to the jury. There is much similarity in sound and much greater similarity in looks. The mistake is caused by the transposition of two letters, an error that is frequently committed by careful writers and typesetters. On the second

page of the record in this case the word "sworn" is printed "sowrn" the o and the w being transposed. In *Herman v. Butler,* 59 Ill., 225, a petition for *certiorari* was refused to review a judgment in favor of Seth Butler against said Herman entered by default upon summons wherein the plaintiff was designated as Seth Bulter. As will be seen, the mistake consisted in the transposition of the letters l and t. In *State v. Patterson,* 24 N. C., 359, 38 Am. Dec., 699, *Gaston, J.,* speaking for the Court, says: "It is also well established that a name merely misspelled is nevertheless the same name." Many variations in sound greater than that under consideration have been held to be merely misprisions in spelling in this State as well as in other jurisdictions; but it is useless to repeat them. A great many are set out in *State v. Collins,* 115 N. C., 716; and still more in 21 Am. & Eng. Ency. (2 Ed.), 313, *et seq.* If the doctrine of *idem sonans* is applicable to criminal actions involving a long term in the penitentiary, we see no reason why it should not be invoked in civil cases where the attending circumstances justify its application. While the issue of contributory negligence was found in favor of the plaintiff, we feel compelled to say that in cases like the present we see no room for its application. The only negligence possibly imputable to the sendee is that of the sender in misspelling her name. This act of negligence was entirely antecedent to the negligence of the defendant, and in no sense concurrent therewith. Moreover, the defendant got the full benefit of that defense under the instructions as to the doctrine of *idem sonans.* If the dissimilarity in spelling were so great as to render it practically impossible for the defendant to identify the addressee after the exercise of due diligence, then there would be no negligence on the part of the defendant, and consequently, neither occasion nor necessity for the defense of contributory negligence. If on the contrary the defendant

could by the exercise of reasonable diligence have identified the sendee and delivered the message in spite of the previous negligence of the sender in misspelling the name, it could not set up such antecedent negligence in bar of recovery. The judgment of the Court below is affirmed.

Affirmed.

FOY v. WINSTON.

(Filed May 17, 1904).

1. INSTRUCTIONS—*Trial—Practice—Verdict.*

A request to charge that the "plaintiff cannot recover" should not be given.

2. NEGLIGENCE—*Municipal Corporations.*

The presence of a strip of timber nailed lengthwise of the street to electric light poles set in the edge of a sidewalk, maintained for over six years and used for hitching animals, does not constitute negligence justifying a recovery for injuries to a blind man running against the same.

ACTION by Pleasant Foy against the city of Winston, heard by *Judge W. A. Hoke* and a jury, at January (Special) Term, 1904, of the Superior Court of FORSYTH County. From a judgment for the plaintiff the defendant appealed.

Lindsay Patterson, for the plaintiff.
Watson, Buxton & Watson, for the defendant.

CLARK, C. J. The plaintiff, a blind man and unattended, attempted to cross the street not at a regular crossing. There was a row of electric light poles on the outer edge of the sidewalk and to two of such poles, which were about five feet

apart, was nailed a strip about two inches square and about ten feet long, which projected beyond one pole about three feet and some six or eight inches beyond the other pole. This strip was nailed four and a half or five feet above the ground and had been there some six years, and was used for a hitching post, being on the edge of the sidewalk around the court-house square. The strip did not obstruct any one passing along the sidewalk or along the street. The plaintiff, coming down the walk from the court-house, instead of turning to the left or right and going to the corner of the square where the street crossings are, attempted to go diagonally across the street at that point, and not discovering by the use of his stick that there was any strip nailed from one post to the other, ran against it and was hurt. Why he should have run against it with such impetus as to be seriously hurt (if he was) does not appear. "The defendant asked the Court to hold as a matter of law that the plaintiff could not recover and to so charge the jury. The Court declined to so hold or charge, but left the question to the jury to decide on the entire testimony whether there was negligence on the part of the defendant in causing the injury. The defendant excepted."

There was no error in refusing to charge that "the plaintiff cannot recover." This instruction is not applicable to our present system, under which there is no general verdict, but the jury responds to issues. *Vanderbilt v. Brown,* 128 N. C., 501; *Bradley v. Railroad,* 126 N. C., 740; *Willis v. Railroad,* 122 N. C., 909, and several other cases there cited. But the Judge erred in "leaving the question to the jury to decide on the entire testimony whether there was negligence on the part of the defendant in causing the injury." There was no conflict in the evidence, and when the facts are known and only one inference can be drawn from them negligence is a question of law for the Court. We do

not see wherein the defendant was negligent. The strip nailed to two electric light poles standing along the outer edge of the sidewalk around the court-house square did not impede travel along the sidewalk or along the street, nor interfere with those passing from one side of the street to the other at the regular and usual crossing places. The strip, used as a hitching rack, was a convenience to those coming to the court-house on business, otherwise than on foot, to have some place to hitch their horses, and it was no inconvenience to any one else. Those living in the country, or too far from the court-house to walk, are entitled to some consideration for their convenience as to hitching their animals. The strip had been there, used for this purpose and without complaint, so far as shown, for about six years. There was no negligence of the defendant shown, and it was the plaintiff's own fault that, blind and unattended, he attempted to cross the street at other than one of the regular crossings provided for the public. In an action by this same plaintiff against the defendant for a different injury, *Foy v. Winston,* 126 N. C., 381, it was held that it was not negligence *per se* for him to pass along the public sidewalk without a guide provided he used ordinary care, adding that "ordinary care on the part of a blind man means a higher degree of care than would be required of a person in possession of all his senses." We did not mean to be understood as giving the plaintiff permission to leave the sidewalk and public crossings provided for pedestrians and to plunge across the streets at any point he chose. Besides, instead of using a "higher degree of care than would be required of a person in possession of all his senses" he used less, since no one in possession of his eyes with ordinary care would have run against the horse-rack. We are, however, not resting the decision upon the contributory negligence of the plaintiff but upon the ground that no negligence has been shown on the part of the defendant.

Error.

DOUGLAS, J., concurring in result. The opinion of the Court says: "When the facts are known and only one inference can be drawn from them, negligence is a question of law for the Court." I know there are precedents tending in that direction, but it seems to me, on the better and greater weight of authority, that the rule is too broadly stated even if instrinsically correct.

Under the rule of "the prudent man"—which seems now to be meeting with practically universal acceptance—negligence, and especially in its proximate relation to the injury, is a mixed question of law and fact for the determination of the jury. The Court can, in proper cases, direct the plaintiff to be nonsuited on the ground that there is no evidence tending to prove negligence, but any intimation that the Court can weigh the evidence and harmonize conflicting inferences, and then say that negligence has or has not been proved, either on the part of the plaintiff or the defendant, is a proposition too dangerous in its tendencies to admit of my approval.

ALLRED v. SMITH.

(Filed May 17, 1904).

1. JUDGMENTS—*Estoppel—Tenancy in Common—Cancellation of Instruments—The Code, secs. 254, 255.*

Where one tenant in common obtains judgment against a co-tenant for the cancellation of a deed, the co-tenant is not estopped to claim title under the deed as against other co-tenants not parties.

2. JUDGMENTS—*Tenancy in Common—The Code, sec. 185.*

Parties claiming rights in property by virtue of a judgment should set up the entire record in the suit in which the judgment was rendered.

CLARK, C. J., dissenting.

ACTION by B. M. Allred and others against H. D. Smith and others, heard by *Judge B. F. Long,* at February Term, 1904, of the Superior Court of RANDOLPH County.

Nancy Allred was the owner of the land in controversy, all parties to the land claiming title under her. She died leaving the plaintiffs and defendants her heirs at law. Prior to her death she executed a deed for the land in controversy to the defendant G. D. Allred. The plaintiff Willie Allred, after the death of her mother, instituted an action in the Superior Court against the defendant G. D. Allred, alleging that at the time of the execution of said deed the said Nancy Allred did not have sufficient mental capacity to execute the same. That she did not assume to sue for or in behalf of any children, heirs at law of said Nancy Allred. At July Term, 1903, the cause came to trial, and upon an issue submitted to the jury it was found that the said Nancy Allred did not have sufficient mental capacity to execute the said deed, and it was "Ordered, adjudged and decreed that the

land described in the complaint, and which is recorded in Book 99, page 310, in the office of the Register of Deeds of Randolph County, and which purports to convey the land described therein from Nancy Allred to the defendant G. D. Allred, is void and of no effect; and it is further ordered, adjudged and decreed that the said deed be delivered up and cancelled of record; and it is further ordered that the Clerk of this Court certify a copy of this judgment to the Register of Deeds of Randolph County, to the end that the same may be registered in the office of the Register of Deeds for said county."

From this judgment no appeal was taken. The plaintiffs instituted this proceeding for partition, and alleged that they and the defendants are each entitled to one-ninth undivided interest of said land as heirs at law of Nancy Allred. The defendant G. D. Allred says that he is entitled to eight-ninths undivided interest in said land by virtue of the deed from Nancy Allred to himself. He admits that by virtue of the judgment in the case of Willie Allred against himself, she is entitled to one-ninth interest therein. The facts in regard to the execution of the deeds and a copy of the judgment are set out in the answer. The plaintiffs demurred to the answer, for that it appeared upon the face of the complaint that the said deed under which the defendant G. D. Allred claimed had been declared void and cancelled. The Clerk sustained the demurrer and directed a sale of the land for partition, to which judgment the defendant excepted and appealed to the Judge. Upon the said appeal the Judge of the district reversed the judgment of the Clerk and overruled the demurrer adjudging:

"Upon the record now before the Court the Court adjudges that Willie Allred and G. Dallas Allred are tenants in common in the lands described in the petition, the said Willie entitled to one-ninth and G. Dallas to eight-ninths, and the

judgment of the Clerk to this extent is reversed and modified."

From this judgment the plaintiffs, other than Willie Allred, appealed.

Oscar L. Sapp, for the plaintiffs.

Robbins & Robbins and *Hammer & Spence*, for the defendants.

CONNOR, J. The deed from Nancy Allred to the defendant G. D. Allred conveyed to him the title to the land in controversy. If she was *non compos* at the time of its execution, the deed was *voidable*, not *void*. "The deed of a person of unsound mind, not under guardianship, conveys the *seizin*." *Odom v. Riddick*, 104 N. C., 515, 17 Am. St. Rep., 686, 7 L. R. A., 118. At her death no estate passed to her heirs at law. They had a right of action and were entitled either jointly or severally, to attack the deed in so far as it affected their rights. Only one of them did so. It is alleged, and the demurrer admits, that she "did not assume to sue for or in behalf of any of the other children." As the basis of her right to sue she alleged that she was an heir of Nancy Allred. This was admitted. The only issue submitted to the jury was directed to the mental capacity of the grantor. The facts appearing upon the pleadings before us are that Nancy executed the deed; that Willie brought the action to set it aside, so that she might inherit her share of the land conveyed; that she prosecuted her action successfully and has the fruits of her victory—one-ninth undivided interest in the land. The brothers and sisters seek to avail themselves of the verdict and judgment in that case to vest title in themselves and to estop the defendant G. D. Allred from claiming any right to or title in the land under the deed. They are not parties to the action. The defend-

ant does not seek to use the judgment as an estoppel or to attack it. He concedes that, as against the plaintiff Willie in respect to her one-ninth, he is estopped. She claims no more, the parties to the action are content to abide its result. When the other plaintiffs, strangers to the action and, as we shall see, not privies, seek to take title under the judgment, or to estop him from denying that they have title, he simply relies upon the well-established principle that "Estoppels must be mutual and bind only parties and privies. One who is not bound by an estoppel cannot take advantage of it." For this position he relies upon the numerous decisions of this Court and the uniform current of authority from the time of Coke to this day. *Pearson, C. J.,* in *Griffin v. Richardson,* 33 N. C., 439, so declares the law. Also in *Falls v. Gamble,* 66 N. C., 455; *Ray v. Gardner,* 82 N. C., 146, *Bryan v. Malloy,* 90 N. C., 508. In *Peebles v. Pate,* 90 N. C., 348, it is said: "Every estoppel must be reciprocal, it must bind both parties; a stranger can neither take advantage of it or be bound by it." *Temple v. Williams,* 91 N. C., 82. Mr. Starkie says, "When the parties are not the same, one who would not have been prejudiced by the verdict cannot afterwards make use of it, for between him and a party to such verdict the matter is *res novo,* although his title turn upon the same point." Starkie on Ev., 332.

"Judgments and decrees are conclusive evidence of facts only as between parties and privies to the litigation. And in case of former adjudication set up in defense, it is no bar unless the parties to the first judgment are the same as those to the second proceeding. On the principle that estoppels must be mutual, no person can take advantage of a former judgment or decree as decisive in his favor of a matter in controversy unless, being a party or privy thereto, he would have been prejudiced by it had the decision been the other way." Black on Judgments, section 534.

We cannot more accurately state the principles underlying the doctrine of estoppel of record than by using the language of *Pearson, J.*, in *Armfield v. Moore,* 44 N. C., 157: "According to my Lord Coke, an estoppel is that which 'shuts a man's mouth from speaking the truth.' With this forbidding introduction a principle is announced which lies at the foundation of all fair dealing between man and man, and without which it would be impossible to administer law as a system. The harsh words which the very learned commentator upon Littleton uses in giving a definition of this principle are to be attributed to the fact that before his day 'the scholastic learning and subtle disquisition of the Norman lawyers (in the language of Blackstone) had tortured this principle so as to make it the means of great injustice': and the object of my *Lord Coke* was to denounce the abuse which he says had got to be 'a very cunning and curious learning' and 'was odious' and thereby restore the principle and make it subserve its true purpose as a *plain, practical, fair* and *necessary* rule of law. Estoppels must be mutual, that is, if one side is bound the other must be. It only includes parties and privies and does not extend to a stranger." Coke Litt., 252 *d.*

It is well settled that tenants in common are not privies; they do not claim under each other; they may claim their several titles and interests from entirely different sources. In this respect they differ from joint tenants and coparceners. "Tenants in common are they which have lands or tenements in fee-simple, fee tail or for terms of life, etc., and they have such lands or tenements by several titles and not by a joint title, and none of them know of this several, but they ought by law to occupy these lands or tenements in common." Coke Litt., 292.

"It is therefore sufficient description of tenants in common

that they are persons who hold by unity of possession." Kent Com., 367.

They may claim by deed, devise or descent, in either case they are deemed to have several and distinct freeholds, "that being a leading characteristic of tenancy in common." "Each tenant is considered solely or severally seized of his land." Kent Com., 368. They can in no proper or legal sense be called privies, because it is said: "In the law of estoppels privity signifies merely *succession* of rights, that is, the devolution in whole or in part of the rights and duties of one person upon another, * * * the derivation of rights by one person from and holding in subordination to those of another, as in the case of a tenant. No one can be bound by or take advantage of the estoppel of another who does not succeed or hold subordinate to his position." Bigelow on Estoppel, 347; Black on Judgments, 549. That tenants in common are not privies, and are therefore not bound by judgments rendered in actions brought by one of their co-tenants respecting the common property, is illustrated by the cases in which it is held that they are competent witnesses for their co-tenant. *Bennett v. Hetherington*, 16 Sergt. & R. (31 Pa.), 193, was an action of ejectment for the recovery of possession of the land held by the plaintiff and the witness. The demise was made by the plaintiff alone. *Gibson, C. J.*, after stating the principle that the interest which excluded a witness was not in the subject matter of the action but in the result or event of it, and that it was not necessary that all of the tenants should join in the devise, said: "Here the plaintiff has elected to sue alone, and what would the witness get by his recovery? The possession of his freehold would not be restored; but for that he would have to bring a second action, in which the record in this would not be competent evidence." The same doctrine is held in *Hummelt v. Blount*, 1 Swan (Tenn.), 385. It is held by this Court that

a tenant in common may sue alone. *Carson v. Smart,* 34 N. C., 369. And in the action of ejectment he would recover to the extent of his right. *Holdfast v. Shepard,* 28 N. C., 361. It was held in England and in many of the States of the Union that tenants in common could not make a joint demise—that to do so would be calculated to perplex the jury with the trial of a number of titles in one issue. *White v. Pickering,* 12 S. & R., 435. In this case the Court said: "There is no privity between the plaintiffs, the estate of each is distinct from the other and they cannot join in a demise." For a discussion of this question, see Sedgwick & Wait on Trial, etc., 300, and cases cited. It was held by this Court in *Nixon v. Potts,* 8 N. C., 469, that they could join; the case being cited in *Hoyle v. Stowe,* 13 N. C., 318. *Ruffin, C. J.*, said that it was held "contrary to the rule in England, which is that as their title is several their demise must also be several. Their demise may be joint because, although they cannot jointly convey the land, they may jointly demise for years, since a demise for years is but a contract for possession, and *"their possession* is joint." No question of estoppel arose because "the judgment was not conclusive upon the title or right of property, even between the parties. The action could be repeated and the same question retried indefinitely because there was no privity between the successive fictitious plaintiffs. * * * Each successive ejectment was founded upon a *new* lease, entry and ouster." Sedgwick & Wait, section 42. The learning upon the subject is of interest, since the abolition of the action of ejectment, with its fictions, only as showing the reason upon which the doctrine of this and some other courts permitting a joint demise was founded. The changes made by The Code system by which the jury may, upon appropriate issues, ascertain and declare the interest or estate of each party, either plaintiff or defendant, cannot be extended to work a change in the

law of estoppel by record, by which one tenant in common may be estopped in respect to his title by a judgment in an action to which he was not a party. *Merrimon, J.*, says: "One tenant in common may sue in many cases without joining his co-tenant. Each has a separate and distinct freehold and he may sue to recover possession when he has been disseized." *Overcash v. Kitchin,* 89 N. C., 384. It is true that, as against a trespasser having no title, a tenant in common suing alone will recover possession of the whole land. If the land belongs to the plaintiff and others in common he has an undoubted right to expel an intruding trespasser and secure possession, his right being full and complete, although others have the same right. *Yancey v. Greenlee,* 90 N. C., 317; *Brittain v. Daniels,* 94 N. C., 781; *Gilchrist v. Middleton,* 107 N. C., 663. Because of this principle, it does not follow that if one tenant in common takes it upon himself to bring an action for the recovery of the common property, alleging title in himself or in himself and his co-tenants, and fails in his action, that his co-tenants are thereby estopped. If this be the law, may we not think, with my *Lord Coke*, that by reason of "a curious and cunning learning" estoppels will become "odious." This Court has never so held. In *Thames v. Jones,* 97 N. C., 121, the Court permitted the plaintiff to sue for the recovery of a tract of land "in behalf of himself and all other persons interested herein as plaintiffs." *Davis, J.*, said: "As to how far the judgment may affect persons made parties under this order we express no opinion. But independent of this, any one or more tenants in common may sue for the recovery of the possession of land."

In *Middleton v. Gilchrist,* 107 N. C., at page 684, *Avery, J.*, said: "One tenant in common may sue alone and recover the entire *interest* [italics ours] in the common property as against another claiming adversely to his co-tenants as well

as himself, though he actually prove title to an undivided interest. This he is allowed to do in order to protect the rights of his co-tenant against trespassers and disseizors." We think the learned Justice inadvertently used the word *"interest"* instead of *possession.* A careful examination of the authorities fails to disclose a single case in which this Court has said that the plaintiff can put in issue his co-tenant's *interest* in the common tenement. The reason assigned by the learned Justice shows that the *"entire interest"* was not in issue. When the plaintiff shows any interest in himself as against one having no interest he recovers possession of the *entire tenement,* because he is entitled as against a stranger "to the possession of every part and parcel of the subject-matter of the tenancy." Freeman, section 87. When he secures such possession, it enures to the benefit of his co-tenants. The same Justice had occasion to review the authorities in *Foster v. Hackett,* 112 N. C., 546. He says: "It is obvious therefore that one of several co-tenants, when he brings an action against a trespasser on the common property and proves title of the other co-tenant in establishing his own, may, under the common law practice in ejectment, applied to actions for the possession of land, recover the whole, though he may claim sole seizin in his complaint in himself, just as he can do under the procedure prescribed in The Code (section 185) by alleging that the action is brought in behalf of himself and others having a common interest, though it has never been determined in this State how far, if at all, in the action under the provisions of the statute, the co-tenants not actual parties would be concluded by the judgment." *Allen v. Sallinger,* 103 N. C., 14; *Lenoir v. Mining Co.,* 113 N. C., 513. In *Winborne v. Lumber Co.,* 130 N. C., 32, *Clark, J.,* says: "One tenant in common can recover the entire *tract* against a third party, for each tenant is entitled to possession of the whole except against a co-ten-

ant." The correct principle is that in respect to the one unity—the possession—the acts of one tenant in common enure to the benefit of his co-tenant, as if an entry be made by one tenant: "As both have an equal right to the possession, the law presumes that if one only enters and takes the rents and profits he does this as well for his companion as for himself." Freeman on Co-tenancy, section 166; *Day v. Howard,* 73 N. C., 1; *Caldwell v. Neely,* 81 N. C., 114, and many other cases in our Reports. So the possession, or the bringing an action for possession, by one repels the bar of the statute as to all. *Locklear v. Bullard,* 133 N. C., 260. In respect to title, interest or estate to or in the common tenement they are strangers, and no act done by one can affect, enure to the benefit of or injure the other. Each tenant has a right, by reason of the unity or the fealty which each owes the other, to rely upon his protection of the common possession. In respect to the title no act by one can affect the other, as if one make a deed for the whole land and the grantee go in *possession,* his *possession* is that of the co-tenant and not adverse until the expiration of twenty years, when the law will presume an ouster. *Cloud v. Webb,* 14 N. C., 317; *Page v. Branch,* 97 N. C., 97, 2 Am. St. Rep., 281; *Breeden v. McLaurin,* 98 N. C., 314; *Ferguson v. Wright,* 113 N. C., 537. It would be an anomaly in the law if one tenant in common could, by matter *in pais,* deed, or record, estop his co-tenant in respect to his title, in regard to which they are absolute strangers. Our researches, with the aid of the excellent briefs of counsel, do not disclose any authority or reported case in which a party has been permitted to rely upon a judgment as an estoppel to which he was not a party or a privy, or which makes any exception to the well-settled rule that estoppels must be mutual. Applying these principles to the record before us we can have no doubt that his Honor was correct in overruling the demurrer. If

the action of Willie Allred against the defendant had resulted otherwise, we would not for a moment suppose that the plaintiffs, other than Willie, would be affected by it. Why they did not join her in the action is not suggested, nor are we to conjecture. For the purpose of testing the question, however, suppose that they had released their right of action to attack the deed, or that they were barred by the statute of limitations, or that they were of service to the plaintiff as witnesses—either of which reasons is consistent with the record—can it be that by absenting themselves from the action they can acquire title to property by an estoppel which they could not have acquired as parties to the action? If their contention be sound, the defendant is estopped as to them in the same manner and to the same extent as to Willie, the plaintiff. There is no suggestion that the judgment is competent as evidence; if of any efficacy it is a complete bar and "shuts the defendant's mouth to speak the truth." He has by estoppel lost the title to seven-ninths of a tract of land without having had an opportunity to defend it as against them. This would be to violate first principles and introduce new and dangerous exceptions to the fundamental limitations of the law of estoppels. It would no longer be entitled to the endorsement of judges, and surely it would surprise the great Chief Justice who so ably defended it in *Armfield v. Moore, supra.*

The plaintiffs say, that conceding the law to be as we find it, the effect of the judgment is to cancel, avoid and utterly destroy the deed; that it is "without legal efficacy, ineffectual to bind parties or to convey or support a right." 28 Am. & Eng. Ency., 28, page 473. The argument is ingenious but will not bear inspection. It assumes the very question in issue. As to whom is it void? The parties to the action? Let us reverse the proposition: If the verdict and judgment had been that the deed was valid and effectual,

could it be said that it was conclusively so as to the plaintiffs? The answer is obvious. The rule of the law is plain, fair and necessary, and it is just. But they say the judgment is *in rem* and settles the *status* of *the deed*. It is not the paper upon which the language of the law is written which vests the title. The Court deals with the deed only as it affects title. This Court has said that the record of a suit between A and B in which the validity of the assignment of a note was adjudged, is no evidence of the validity of such assignment in an action between A and D, the latter not being a party to the former suit. *Swepson v. Harvey,* 69 N. C., 387. The action clearly was not a proceeding *in rem.* If *quasi in rem* the plaintiff is met with the difficulty that in such actions judgments are only binding between the parties. Black on Judgments, section 793. To the suggestion that if defendant is attacking the judgment as being erroneous, it is sufficient to say that one not a party cannot take any advantage of an eroneous judgment. If Willie Allred was claiming the entire land because of the form of the judgment, the suggestion would have some apparent force. There is another view of this case not adverted to. If the plaintiffs claim that they acquired certain rights of property under the judgment, they should have set up the entire record to the end that the Court could see what was in litigation and what was adjudged. After a careful examination of the authorities and arguments, we think that the judgment of his Honor should be affirmed. It is a mistake to say that his Honor rendered final judgment. The case was not before the Judge for judgment, but only to pass upon the appeal from the ruling of the Clerk on the demurrer. The Code, section 254 and 255. His Honor's ruling remanded the case, in so far as it was before him, to the Clerk. As the case is in the Court for further orders, the plaintiffs may, if so

advised, ask for permission to reply to the answer. Let this be certified.

Affirmed.

CLARK, C. J., dissenting. In a proceeding duly constituted in a court of competent jurisdiction, and in which the defendant G. Dallas Allred was defendant, the jury found that Nancy Allred was without sufficient mental capacity to execute the deed to G. Dallas Allred covering the land in question, and the Court adjudged that said deed "from Nancy Allred to G. Dallas Allred is *void and of no effect*. And it is further ordered, adjudged and decreed that the said deed be delivered up and *cancelled of record*," with further judgment that the decree should be certified to the Register of Deeds, to be recorded in his office. The deed being adjudged "void and of no effect," the title of the grantee thereunder absolutely ceased (The Code, sections 426, 428) as fully as if a reconveyance had been executed and recorded. The proceeding was in the nature of an action to remove a cloud from the title, and the judgment, acting upon title to property, adjudging the conveyance to the defendant to the action to be *null and void*, and directing its cancellation and the registration of the decree in the register's office, where the conveyance to the defendant had been recorded, such proceeding has been held "though not strictly proceedings *in rem*, * * * yet they are regarded as proceedings *in rem sub modo*." Hence the judgment cancelling the defendant's title rendered it invalid as to all the world, as is the case with all judgments *in rem*. The matter stands therefore as if the conveyance to G. Dallas Allred had never been made. He certainly is bound by the judgment. The decree renders the deed void *ab initio*, and, if void, it is void as to every one, especially as to the plaintiffs who claim under Nancy Allred. The decree having directed the cancellation

of the deed and the registration of the decree in the register's office, there is, in contemplation of law, no such conveyance in existence. The registration of the decree of cancellation was directed, that purchasers from G. D. Allred should have notice that he could convey no title. He cannot now set up a title when a purchaser from him could not acquire title from him.

It matters not at whose instance, as plaintiff, such decree was rendered, or that it was at the instance of only one of several co-tenants. It was rendered *against* the defendant: it binds him. Its effect was to declare that the title has never proceeded out of Nancy Allred and to cancel the conveyance and to strike the registration thereof off the register's books. It is not open therefore to the grantee in such deed to set it up as valid in this proceeding to partition the land, especially against the plaintiffs, who have acquired by descent all of Nancy Allred's title, save the share which has descended to him. He holds that share by descent, the same title by which the plaintiffs hold theirs, and not under the void deed.

If in the proceeding to declare the deed void it had been held valid, this would have been a judgment *in personam* against Willie Allred, the plaintiff therein, and would not bind the other plaintiffs herein because they do not claim under Willie Allred. But the judgment declaring the deed void and directing its cancellation acts *quasi in rem sub modo* upon the title which it sets aside, and is binding upon G. D. Allred, who is the same defendant, and who in this action attempts to set up the same title which, as against him, has been declared void. Further, being a decree *quasi in rem sub modo,* it is binding upon all who might claim under G. D. Allred. The decree of cancellation, registered as decreed, is notice to all the world. The Code, sections 426, 428.

Closely analagous is the case wherein an application of a railroad company to acquire the right to use the track of another company for purposes of its business, the applicant was held concluded by a former adjudication against its corporate existence, rendered in a former proceeding by the same plaintiff for the same purpose against another railroad company. (*In re Brooklyn Railroad,* 19 Hun, 314), and a determination that a creditor is entitled to share in a fund. *Eppright v. Kauffman,* 90 Mo., 25. The adjudication here that the deed is void is a judgment upon the *rem,* upon the status of the title, denying G. D. Allred's interest thereunder, and is conclusive upon him whenever and wherever thereafter he sets up title in himself under the deed which has been adjudged void and directed to be cancelled. The principle is *res judicata* and not strictly matter in estoppel. 24 Am. & Eng. Ency. (2 Ed.), 712. The judgment setting aside the deed to G. D. Allred, as void, enured to the benefit of the other plaintiffs, as co-tenants, who became thereupon beneficiaries under and privies to the decree which cancelled the deed. The legal consequence of the judgment, declaring the deed void as to G. D. Allred, can be availed of by strangers to the action. 11 Am. & Eng. Ency. (2 Ed.), 391.

The judgment is also admissible, even if between strangers, as a link in the plaintiffs' title, since it cancels the cloud cast upon it by the deed from Nancy Allred to G. D. Allred. 24 Am. & Eng. Ency., 757. Especially when, as here, the decree is a decree in chancery. *Ibid.,* 758, and cases cited in note 2.

It was error certainly to render final judgment upon overruling the demurrer, unless it was found that the demurrer had not been "interposed in good faith." The Code, section 272; *Moore v. Hobbs,* 77 N. C., 65; *Bronson v. Ins. Co.,* 85 N. C., 411.

The deed was voidable, *i. e.,* valid till declared void by the Court. *Odom v. Riddick,* 104 N. C., 515. But when adjudged void and directed to be cancelled, it ceased to be voidable and became absolutely void. No conveyance had been made to third parties by G. D. Allred prior to such decree. A conveyance by him thereafter would be void, and certainly no title remained in him when he could convey none.

HUNTER v. TELEGRAPH CO.

(Filed May 17, 1904).

1. TELEGRAPHS—*Issues—Mental Anguish—Damages.*

The proper second issue in an action for damages on the question of mental anguish is: "What damage, if any, has the plaintiff sustained on account of mental anguish caused by such negligence."

2. TELEGRAPHS—*Damages—Expenses.*

In an action against a telegraph company to recover damages for failure to deliver a message announcing the death of a person, the plaintiff cannot recover his expenses in going to the deceased.

3. TELEGRAPHS—*Mental Anguish—Relationship.*

In an action against a telegraph company, a person is entitled to recover damages for mental anguish for failure to deliver a message announcing the death of a second cousin.

3. TELEGRAPHS—*Mental Anguish—Relationship.*

In an action against a telegraph company for damages for failure to deliver a message announcing the death of a second cousin, it is not necessary to disclose to the company the relationship between the sender and the sendee, when it relates to sickness or death.

CONNOR, J., dissenting.

HUNTER *v.* TELEGRAPH CO.

ACTION by T. A. Hunter against the Western Union Telegraph Company, heard by *Judge W. R. Allen* and a jury, at February Term, 1903, of the Superior Court of GUILFORD County.

This is an action brought by the plaintiff to recover damages caused by the non-delivery of a telegram addressed to the plaintiff, announcing the death of a second cousin, a child five years of age. The telegram was as follows: "Scott died last night; will be buried to-morrow morning."

The plaintiff, T. A. Hunter, was allowed, under objection and exception by the defendant, to testify, among other things: "That he came to Greensboro many years ago, and that for several years next thereafter he lived in the family of his cousin, J. S. Hunter, who was the father of the child 'Scott,' mentioned in the telegram; that he married seven years before the death of the child; that he had not lived in J. S. Hunter's family for six years last before the death of the child, but had lived across the street from him. The child was only five years old when he died; that he was born a year after he quit living in the family of J. S. Hunter; that by reason of the relationship and close association he saw a great deal of the child from time to time and loved him very much; that he stood next to his own children in his affection; that he thought a great deal of the little fellow; he was a bright little chap; that he had him on his knee often and naturally thought a great deal of him; he was very dear to me." That he could have gotten home to the funeral if the message had been delivered any time prior to twelve o'clock on the night of the 15th, and that his failure to be at the funeral caused him great pain and anguish of mind. The witness figured up his actual travelling expenses and other things in coming and going, to a sum not exceeding $18.80, and claimed damages in addition thereto for mental anguish caused by not being at the funeral of the child Scott.

The defendant objected and excepted to the action of the Court in allowing the plaintiff to testify in regard to his affection for the child and his anguish and suffering, and insisted that the degree of relationship was too remote to be regarded as an element for damages in this case.

The defendant presented in writing the following prayers for special instructions, which were refused:

"3. It being admitted that Scott, referred to in the pleadings and in the message, was a second cousin of the plaintiff, such relationship was so remote that the failure to get the message in time to be present at the funeral is not the basis for a claim for damages, and the consequent mental anguish therefrom is too remote. You will therefore not consider that in making up your verdict."

"4. Mental anguish on the part of the plaintiff is not an element of damages in this case, it being admitted that the relationship between plaintiff and Scott, mentioned in the telegram, was second cousins."

"5. There is no evidence that the defendant had any knowledge of any peculiar or intimate relations existing between plaintiff and the child Scott, and in the absence of such, it being admitted that Scott was the son of a cousin of the plaintiff, the plaintiff cannot recover anything for or on account of mental anguish."

"6. If the plaintiff is entitled to recover anything, it is only his actual expenses in coming to Greensboro and returning to his business."

Upon the second issue the Court charged the jury, among other things, in substance, that if they believed the evidence they would find that J. S. Hunter was the father of the "Scott" referred to in the telegram and that the plaintiff and J. S. Hunter were first cousins, and that from such relationship there is no presumption that the plaintiff suffered mental anguish on account of his inability to be present at the

funeral of the child Scott, but that the burden was upon the plaintiff to show by the greater weight of evidence that there existed between the plaintiff and the said Scott such tender ties of love and affection that his inability to be present at the funeral caused him to suffer mental anguish, and that such inability to be present was caused by the negligence of the defendant.

The issues and answers, thereto were as follows: 1. "Was the defendant guilty of negligence, as alleged in the complaint?" "Yes." 2. "What damage, if any, has the plaintiff sustained on account of mental anguish?" "One hundred and fifty dollars." 3. "If so, what damage, if any, has plaintiff sustained on account of expenses incurred?" "Eighteen dollars and eighty cents." The defendant appealed from the judgment rendered. (The former opinion in this case is reported in 130 N. C., 602).

Scales, Taylor & Scales, for the plaintiff.

King & Kimball and *F. H. Busbee & Son,* for the defendant.

DOUGLAS, J., after stating the facts. Although there is no exception to the issues, and apparently no misunderstanding as to their meaning, we think it better to call attention to the inaccuracy of the second issue. It should read as follows: "What damage, if any, has the plaintiff thereby sustained on account of mental anguish?" Or, "What damage, if any, has the plaintiff sustained on account of mental anguish caused by such negligence?" The exact form of the issue is immaterial, but it should directly present the casual relation between the negligence of the defendant and the damages sustained therefrom by the plaintiff. This is especially important in suits involving mental anguish. The defendant did not contribute to the death of the child in any way,

and cannot be held responsible for any anguish or sorrow directly resulting from his death. All that it can be held liable for is the *additional* anguish caused by its own negligence, which, in this case, seems to be only the anguish resulting from the failure of the plaintiff to be present at the funeral. We use the word "anguish" as indicating a high degree of mental suffering, without which the plaintiff should not recover substantial damages. Mere disappointment would not amount to mental anguish or entitle the plaintiff to more than nominal damages. In all cases, damages for mental anguish are purely compensatory, and should never exceed a just and reasonable compensation for the injury suffered. As this Court has said in *Cashion v. Telegraph Co.*, 124 N. C., 459, 45 L. R. A., 160, if the defendant has been negligent, it is the duty of the jury "to give to the plaintiff a fair recompense for the anguish she has suffered from such negligence, but from that alone; and in determining the amount they should render to each party exact and equal justice without the shadow of generosity, which is not a virtue when dealing with the property of others."

As both parties seemed to be content with the issues, which may not have caused any confusion in the minds of the jury, we do not feel authorized to set aside the verdict. However, as there might be cases in which such issues would be fatally defective, we deem it better to again call the attention of the profession to the importance of having issues which, either in themselves or in connection with admissions of record, are sufficient to sustain the judgment. *Tucker v. Satterthwaite,* 120 N. C., 118.

We do not think that the plaintiff can recover his expenses coming to Greensboro, as they do not appear to have been caused in any way by the defendant's negligence. If the defendant had been guilty of no negligence whatever, and the telegram had been promptly delivered, the plaintiff would

apparently have incurred the same travelling expenses in coming to Greensboro. Therefore the amount of $18.80 found in the third issue must be stricken out of the judgment.

The defendant contends that, as a matter of law, the plaintiff cannot recover on account of simple inability to attend the funeral of a second cousin, and that if he can so recover he can do so only upon the absolute prerequisite that the defendant knew or was informed of the peculiar relations existing between him and the child. Both of these questions have been decided by this Court adversely to the defendant. In *Cashion v. Telegraph Co.*, 123 N. C., 267, it was held that, while the relation of brother-in-law is not sufficiently near to raise any presumption of mental anguish, the actual existence of said anguish, if found as a fact by the jury, would entitle the plaintiff to recover substantial damages. In that case the Court says: "It is true that there are certain facts which, when proved, presume mental anguish. The tender ties of love and sympathy existing between husband and wife or parent and child are the common knowledge of the human race, as they are the holiest instincts of the human heart. * * * But beyond the marriage state, this presumption extends only to near relatives of kindred blood, as acute affection does not necessarily result from distant kinship or mere affinity. A brother's love is sufficiently universal to raise the presumption, but not so with a brother-in-law, who is often an indifferent stranger and sometimes an unwelcome intruder in the family circle. It is true that with him such affection may exist, and in the present case doubtless does exist, but it must be shown."

In *Bennett v. Telegraph Co.*, 128 N. C., 103, the Court, speaking through *Clark, J.*, says: "The objection that the relationship of the sendee (father-in-law) does not entitle the plaintiff to recover for mental anguish by reason of fail-

ure to be at his daughter's funeral, is answered by the discussion and decision in *Cashion v. Telegraph Co.*, 123 N. C., 267."

This line of decisions has been so recently affirmed and followed in the well-considered opinion in *Bright v. Telegraph Co.*, 132 N. C., 317, that further discussion seems useless. The Court, speaking through *Walker, J.*, says, on pages 322, 323: "The law does not regard so much the technical relation between the parties or their legal status in respect to each other as it does the actual relation that exists and the state of feeling between them. It does not raise any presumption of mental anguish when there is no relation by blood, but if mental suffering does actually result from the failure to deliver a message where there is only affinity between the parties, it may be shown and damages recovered. A woman suddenly bereft of her husband, and who has no father or other relative or friends to whom she can turn in her distress, except the uncle of her husband, might well call upon him for consolation and assistance, especially when, as is abundantly shown in the evidence in this case, he was her husband's nearest living relative, and had reared and educated him and was 'devoted to her husband and herself,' and stood toward them in the place of a parent. She had every right to expect that as soon as the sad news of the death of her husband had reached him, he would come at once to her and give her that comfort, consolation and assistance which she sorely needed. If he was not her father, he entertained for her all of the tender regard and affection of a parent, and was as much interested in her welfare as if he had been her father, and she could therefore reasonably expect that he would do, under the circumstances, precisely what her father would have done if he had been living. It is needless to discuss the question further, as this Court has settled it against the defendant. 'We do not mean to say,'

says *Douglas J.*, speaking for the Court, 'that damages for mental anguish may not be recovered for the absence of a mere friend, if it actually results; but it is not presumed. The need of a friend may cause real anguish to a helpless widow, left alone among strangers with an infant child and the dead body of her husband. In the present case, the plaintiff seems to have received the full measure of Christian charity from a generous community, but it may be that she did not expect it, and looked alone to her brother-in-law, whose absence she so keenly felt. If so, she may prove it,' citing *Cashion v. Telegraph Co.*, 123 N. C., 267."

It will be seen that the cases all proceed upon the principle that the nearness of the relationship is material only where the presumption is relied on; but that mental anguish may exist as a fact where there is no such presumption. In such cases it is a matter of proof, and may be inferred from all the surrounding circumstances, as well as the personal testimony of the plaintiff. The plaintiff is of course an interested witness, and his testimony, like that of all such witnesses, should be scrutinized with care; but if after such scrutiny the jury believe he has testified truthfully, they should give to his testimony the same weight they would to that of any other credible witness. There is no reason why a party should not become a witness in his own behalf, especially in matters peculiarly within his personal knowledge, and the law does not discredit him for doing so, but simply provides for that just scrutiny by which alone the motives of human conduct can be interpreted.

The second exception is to the refusal of the Court to charge that the plaintiff could not recover in the absence of any evidence that the defendant knew or was informed of the peculiar and intimate relations existing between the plaintiff and the deceased child. Such instructions were properly refused, as has been repeatedly held by this Court. *Sherrill*

v. Telegraph Co., 109 N. C., 527; *Lyne v. Telegraph Co.*, 123 N. C., 129; *Cashion v. Telegraph Co.*, 123 N. C., 267; same case, 124 N. C., 459; *Laudie v. Telegraph Co.*, 124 N. C., 528; *Hendricks v. Telegraph Co.*, 126 N. C., 304, 78 Am. St. Rep., 658; *Laudie v. Telegraph Co.*, 126 N. C., 431, 78 Am. St. Rep., 668; *Bennett v. Telegraph Co.*, 128 N. C., 103; *Meadows v. Telegraph Co.*, 132 N. C., 40; *Bright v. Telegraph Co.*, 132 N. C., 317.

In Sherrill's case the telegram was, "Tell Henry to come home, Lou is bad sick." In Lyne's case it was "Gregory met accident; not live more twenty-four or twenty-six hours." In Cashion's case it was "To J. W. Mock. Come at once. Mr. Cashion is dead; killed at work. John Payne." In Laudie's case it was "Frank dead. Meet depot at Wadesboro 8 A. M. Bury him in Chesterfield; grave three feet." In Hendricks' case it was "Presh died this morning," and "Come quick, will bury Presh to-morrow." In Meadows' case it was "Will Phillips' wife at point of death." In Bright's case it was "Mr. Bright is dead, will bury at Liberty Sunday morning." In that case, 132 N. C., at page 324, *Walker, J.*, speaking for the Court, says: "It is not a valid objection to the plaintiff's right of recovery that the message did not sufficiently disclose its purpose, or show that the plaintiff desired Cooper to come to Wadesboro. It has been repeatedly decided by this Court, in cases where the relationship of the parties was not disclosed, and the special purport of the message could not possibly have been understood, that it was not necessary for the company to know the relation between the sender and sendee from the terms of the message, or to know anything more than that the message is one of importance, and that this should always be inferred from the fact that it relates to the illness or death of a person. When this is the case, it is sufficient to put the company on notice

that a failure to deliver will result in mental suffering, for which damages may be recovered."

The judgment of the Court below is

Affirmed.

CLARK, C. J., concurring. Mental suffering is as real as physical. Every one who has suffered either is a competent witness that there is no fiction about it. There is the same practical difficulty in measuring compensation for physical anguish as for mental, but the same difficulty arises also in nearly all cases of estimating unliquidated damages. Juries, under the instruction of learned and just judges, who will restrain excessive verdicts, must, upon consideration of all the evidence, award fair compensation. All courts allow compensation for mental suffering, not only when accompanied by physical pain, but in many cases when there is no physical suffering, as in actions for seduction, slander, libel, breach of promise of marriage, and perhaps some others. The courts in the several independent State jurisdictions in this country have not been agreed as to the allowance of damages for mental suffering when it has been caused by the wrongful or negligent conduct of a telegraph company in the delay or non-delivery of what is known as death messages, but the uniform and unbroken decisions of this Court place it among those that allow recovery in such cases. The legal rule laid down is clear and just: "In all cases, damages for mental anguish are purely compensatory and should never exceed a just and reasonable compensation for the injury suffered." And we have just repeated in *Bowers v. Telegraph Co.*, 135 N. C., at this term, that mere disappointment will not amount to mental anguish.

When the relationship of the parties is close, the law presumes some mental anguish from the fact that the telegram was sent, the amount of the compensation for the mental suf-

fering caused by the failure to deliver being a matter for the jury upon the evidence. The nearness of the relationship is only material when this presumption is relied upon. There is no better statement of the rule on this point than that to be found in the clearly reasoned opinion of *Mr. Justice Walker* in *Bright v. Telegraph Co.*, 132 N. C., 317: "The law does not regard so much the technical relation between the parties, or their legal status to each other, as it does the actual relation that exists and the state of feeling between them. It does not raise any presumption of mental anguish when there is no relation by blood, but if mental suffering does actually result from the failure to deliver a message (of this nature) where there is only affinity between the parties, it may be recovered. * * * It is not necessary for the company to know the relation between the sender and the sendee from the terms of the message, or to know anything more than that the message is one of importance, and this should always be inferred from the fact that it relates to the illness or death of a person. When this is the case, it is sufficient to put the company on notice that a failure to deliver will result in mental suffering, for which damages may be recovered."

Since it is established as a fact in this case that there was mental suffering caused by the defendant's failure to deliver the telegram, and there was evidence to prove it, this case does "not fall beyond the limits of the law," which holds the defendant liable to render just compensation for the injury it has inflicted.

WALKER, J., concurring. The doctrine of mental anguish which has been recognized and applied in this Court for many years, either has no scientific or rational basis upon which to rest so as to justify a recovery by father, brother, husband, or any other person bound to another by a close tie of blood or marriage, of damages from a telegraph company

for the negligent failure to deliver a message, or the rulings and judgment in this case must be free from error. We cannot deny to the plaintiff the right to recover any damages which he may have sustained, unless we completely repudiate the doctrine, reverse our former decisions and deny to everybody the right to recover damages for mental anguish caused by the negligence of a telegraph company in delivering messages. When we once admit the correctness of the principle upon which such recoveries have been based (and this has been done at the present term in *Cogdell v. Telegraph Co.*, and *Hood v. Telegraph Co.*, and at the February Term, 1902, in *Meadows v. Telegraph Co.*, 132 N. C., 40, and *Bright v. Telegraph Co.*, 132 N. C., 317, by a unanimous court), we must carry this admittedly correct principle to its legitimate and logical conclusion and to its necessary consequence, and permit a recovery by any one, without regard to the closeness of relationship, who can show the negligence and that mental anguish proximately resulted therefrom.

The doctrine, as stated in the former decisions of this Court, could not have been restricted to close relationship, but in its very nature extended to those which are remote, as it was founded upon a breach of public duty by the telegraph company, which duty required that messages should be transmitted and delivered with reasonable care and dispatch and with due regard for the rights of the patrons of the company. The public is vitally interested in the performance of this duty and, whenever there is a breach of it, the right to recover damages flowing from the breach depends upon the ability of the party who alleges that he has been injured by the failure of duty to prove his *actual* damages, which include damages for mental anguish, and may consist solely of such damages. *Cashion v. Telegraph Co.*, 123 N. C., 267. It is a question of proof, and not one of close relationship, which determines the right to recover damages for the injury.

We can imagine a case where there is no relationship, and yet where the parties are quite as closely united and bound to each other by ties of affection as if a close relationship existed. The closeness of the relationship does not of itself necessarily prove that there has been mental anguish where there has been a negligent failure to deliver a message. It is a circumstance to be considered by the jury in determining whether or not there has been any mental suffering, and this Court has said that the relationship of the parties may be so close as to raise a presumption of mental anguish and consequent damage. The doctrine, as established by the former decisions of this Court, is that mental anguish may be the basis for the recovery of damages without regard to the particular relationship of the parties. The relationship was referred to merely as being evidence of mental anguish, which is strong or weak, according to the degree of relationship. It was never intended to assert that a person who is not closely related by blood or marriage to the person whose sickness or death is announced in the message cannot recover if mental anguish actually resulted from the default of the defendant. Take the case of a person who is but slightly related to the person whose sickness or death is announced in the message, but who stands towards him *in loco parentis*. Should he be denied the right to recover when a son, between whom and his father there has been long estrangement and bitterly hostile feelings, is permitted to recover for failure to deliver a message announcing his father's sickness or death, merely because he and his father are closely related by blood? I go back to my first proposition: The doctrine is either fundamentally wrong, or if it is right the idea that it is confined to close relations must be abandoned, as, in my judgment (and I say so with the utmost respect for the opinion of others), it has nothing to sustain it. If the doctrine established by our former decisions is wrong, it should be promptly

reversed, and the cases in which it was established should be overruled; but if it is right, it should be enforced by a reasonable and, above all things, a logical application of the principle on which it rests to the facts of each case as presented. I can see no middle ground upon which we can safely stand. We are either right in this particular case or we are wrong altogether. If the doctrine is limited in its operation, as suggested, I cannot give my assent to it at all, for there must be something radically wrong in a principle which cannot be safely carried to its logical results, so as to reach all cases coming fairly within its scope. If the reason upon which the doctrine is founded applies to one case, it must apply to all, leaving the degree of kinship to affect only the amount of the damages. The insuperable difficulty which it is admitted will be encountered in drawing the line at which the doctrine must cease to have any application, is a cogent reason for the assertion that there is no limit to the doctrine if it was a sound one in its origin. It is replied that the line at which there ceases to be a presumption of mental anguish cannot be drawn with any accuracy. This may be a reason, not for questioning the correctness of the doctrine, nor for limiting it in its operation, but merely for denying that there is any such presumption. It may be that it would be more correct to say that relationship is a fact or circumstance to be considered by the jury as evidence of mental anguish, which will be stronger or weaker in its probative force in proportion to the degree of relationship, whether near or remote. My conclusion is that if we are to continue to recognize and enforce the right to recover for mental anguish, the principle which underlies and supports that right cannot be confined to any merely arbitrary limit, but must be applied to any case in which a negligent failure to deliver a message may cause mental suffering.

If the principle has no proper place within the borders of

our jurisprudence, we should drive it out at once as an unwelcome intruder, and not expel it by gradually limiting its sphere of operation or by a slow process of elimination. I repeat: The doctrine of mental anguish, as it is called, is either radically wrong, or it applies to the facts of this case.

CONNOR, J., dissenting. The doctrine by which the sendee of a message was held to be entitled to recover for failure to deliver promptly, in addition to nominal damages, compensation for mental anguish, was first established by this Court in *Young v. Telegraph Co.*, 107 N. C., 371, 9 L. R. A., 669, 22 Am. St. Rep., 883. The message in that case announced the extreme illness of the sendee's wife and urged him to "come in haste." As the facts appeared in the record they appealed strongly to the feelings of the Court—the negligence was gross. The doctrine then established has been fruitful of much litigation. Many of the cases have shown gross negligence, and some of them most aggravating and intense suffering caused thereby. Whatever may be my opinion of the scientific basis of the doctrine, I have no disposition to regard it as an open question in this Court. It is settled here. No one who has given the question careful thought can fail to be impressed with the difficulty of giving it a satisfactory practical operation. To estimate and separate in dollars the quantum of suffering, mental and otherwise, a person experiences by reason of learning of the death and of being unable to attend the funeral of a deceased relative must give to a conscientious juror much difficulty. I cannot but think that if the Judge who, with great lucidity, lays down the principle, were called upon to apply it, the doctrine would not find so much favor. However this may be, the best answer to the objection that it is difficult to do is found in the fact that it is done. The only question presented by the appeal in this case is whether a doctrine originating in the case of an absent husband summoned to the

death-bed of a dying wife, and applied to other and more distant relatives, is to have any limit whatever, I fully recognize how difficult it is to fix the limit. As I understand the cases, within a certain limit there is a *presumption* that the plaintiff sustained mental anguish, as in case of a brother. *Cashion v. Telegraph Co.,* 124 N. C., 459. Beyond this limit there is no presumption, but the plaintiff must retain in his memory, and, months after the injury, unfold his mental condition to the jury to enable them to say how many dollars will compensate him. The Court says: "Damages for mental anguish are purely compensatory and should never exceed a just recompense for the anguish." If it be said, as it certainly is, that it is difficult to say within what degree of relationship the sendee has a cause of action, it may be answered that it is not more so than to say within what degree there is a *presumption* of mental anguish. It is said that fictions in the law "have had their day," and "have been dead thirty-five years." It would seem, with all possible deference, that the doctrine of mental anguish, with its logical results, is not very far removed from the domain of legal fiction.

I cannot concur in the conclusion reached by the Court in this case. It may be that the Court is committed to an unlimited field of litigation in these cases. I do not care to review the cases. I simply wish to say that in my opinion if any limit is ever fixed, the plaintiff's case will fall far beyond the outside boundary. It is difficult to discuss these cases. Men view such matters so differently that they may not easily make themselves understood. If it is desired to compel the defendant company to discharge its duty to the public with all reasonable promptness and dispatch, there can be no doubt that the Legislature has the power by appropriate legislation to do so.

I do not think that the plaintiff in any respect of the testimony is entitled to recover for mental anguish.

WOMBLE v. GROCERY CO.

(Filed May 17, 1904).

1. NONSUIT—*Negligence.*

In this action for personal injuries, the evidence of the negligence of the defendant is sufficient to be submitted to the jury.

2. NEGLIGENCE—*Personal Injuries.*

In an action for injuries caused by the falling of an elevator, the falling thereof without some apparent cause is evidence of negligence in its original construction.

3. NEGLIGENCE—*Master and Servant.*

In an action for injuries caused by the falling of an elevator, a failure to inspect the same for eighteen months is evidence of negligence.

4. ASSUMPTION OF RISK—*Negligence—Contributory Negligence.*

A servant employed to operate a freight elevator does not assume the risk of injury owing to a fall of the elevator, in the absence of knowledge of any defect therein, and of any duty to inspect it.

5. ASSUMPTION OF RISK—*Issues—Negligence.*

In an action for injuries to a servant, contributory negligence is an affirmative defense, and any issue thereon must be tendered by defendant in order to be available.

ACTION by W. C. Womble against the Merchants Grocery Company, heard by *Judge W. R. Allen* and a jury, at February Term, 1903, of the Superior Court of GUILFORD County.

The plaintiff alleged that the defendant company was engaged in the wholesale grocery business in the city of Greensboro, receiving and shipping large quantities of groceries and other goods, which were kept and stored in their

store-house in said city; that said store-house was four stories high, in which there was an elevator for the purpose of carrying goods to the different floors and lowering them to the first floor for delivery and shipment. That plaintiff was employed by defendant, and among other duties required of and imposed upon him was that of transferring from floor to floor goods as aforesaid by the use of the elevator; that said elevator was furnished by the defendant company. That the said elevator was defective in its construction and unsafe for the purposes for which it was used; that the defendant negligently failed to examine and inspect it, and that by reason thereof the defendant failed to ascertain its defective condition. That on the 31st day of August, 1900, while engaged in the work imposed upon him by the defendant, and not knowing of any defect in the elevator, plaintiff went upon said elevator in the discharge of his duty at the fourth floor of the said store; that by reason of its defective condition the cable or rope pulled out of its fastening, thus separating the elevator from the weight by which it was pulled, and by falling to the basement floor the plaintiff suffered serious injuries. The defendant denied the material allegations in the complaint, and alleged that the injuries sustained by the plaintiff was incident to the risk assumed by him in his employment, and that the proximate cause of such injury was the negligence of the plaintiff. The Court submitted the following issues to the jury: (1) "Was the plaintiff injured by the negligence of the defendant?" Answer. "Yes." (2) "If so, what damage has plaintiff sustained?" Answer. "Three thousand dollars."

From a judgment upon the verdict the defendant appealed.

Scales, Taylor & Scales, for the plaintiff.

W. P. Bynum, Jr., and *King & Kimball,* for the defendant.

CONNOR, J. The defendant having demurred to the evidence and moved for nonsuit, its first exception is directed to the refusal of his Honor to sustain the motion. The plaintiff testified, in substance, that he entered the employment of the defendant on January 20, 1899, coming to Greensboro from Chatham County where he had lived up to that time; that he was hired to truck freight and handle goods. That the goods were trucked on different floors and carried from one floor to another on an elevator. That he had seen one or two elevators before entering the service of the defendant, but had never been on one and had never seen one work. In about a month after he entered the service of the defendant it removed its stock of goods to another building, and that the elevator by which he was injured was put into the building to which the defendant moved; that the elevator was a large one run by a wire cable; that it would run with good speed; that a rope was used in pulling the elevator up, and there was a cable that ran over a pulley; that there was a weight in a box two feet by six inches at the back of the elevator on the side of the wall, and that the box ran from the upper floor to the bottom of a five-story building, counting the basement, and that the weight ascended and descended; that it ran to the fourth story; that goods were carried up from one floor to the other by this elevator, and that when the elevator was loaded the plaintiff would get on it and pull it up; that at the time he got hurt he usually rode on the elevator; a man who wanted to carry goods from one floor to another generally got on the elevator and rode up, if there was not too many goods on the elevator, and that sometimes as much as two thousand pounds was put on, and that it was his duty to carry the goods from one floor to another, and that he did as others, rode on the elevator; that the proprietors and others rode on it; that he was certain he had ridden on the elevator

with the president of the company; that no one had told him not to ride on the elevator. That on the day he was hurt there was six hundred pounds of goods on the elevator besides his own weight; this was a very small load. There was no understanding with him about inspecting the elevator, and it was no part of his duty to do so; that there was another man in the house that did more of that kind of work than the plaintiff; the elevator was never inspected while he was at work for the defendant, to his knowledge, that he knew of no defect in it. There was a stairway leading from one floor to another which was constantly used, and he had the option of going up and down the elevator, and rode on it of his own volition, and for the reason that everybody else rode on it; he did not ride on it all the time, sometimes walked down the steps, sometimes rode on the elevator, being merely a matter of choice; that he had been operating this elevator from the time it was put up early in 1899 to August, 1900, and that it was a new elevator. The box containing the weight ran alongside of the wall and extended from the basement floor up as high as the plaintiff's head above the fourth floor, and that there was an open space in the box near the top and above the fourth floor, but that he had never noticed as to whether the condition of the weight and its fastening to the cable could be seen through this opening at the top of the box when the elevator car was at the bottom floor. The cable was a wire rope, composed of several strands of wire, and was about three-quarters of an inch in diameter, but he did not know how it fastened to the weight. That at the time of the accident he took off the brake and the elevator fell from the fourth floor to the basement; that this took place when he stepped on the elevator and released the brake.

A witness introduced by the plaintiff testified that he was booker for the defendant at the time of the injury in question; that the goods were taken to their proper place by the

elevator, and brought down in the same way when shipped. That the plaintiff's duties were to take the list of goods given him by the shipping clerk and get the goods out and bring them to the front door and put them on the dray. The elevator was not used by the officers of the company, but he believed he had seen Simpson go up on the elevator, but not often; it was a freight elevator; that investigation was made by the company as to the cause of the falling of the elevator and witness could see where the planks were rough or uneven. After the accident witness noticed fastening of the cable to the weight, and the cable was fastened by running through an eye in the weight and running back about eighteen inches, and the lapped portions were fastened with four clamps screwed together with bolts and nuts; that one clamp held the cable ends together and another fastened between that and the weight; that when witness first saw clamps after accident they seemed to be all right and seemed to be securely fixed together; but the rope had slipped through; that the clamps were not loose; that the end of the cable was frayed; that the same clamps were used in fastening the cable back to the weight after the accident.

Defendant's first contention is that upon the plaintiff's evidence his Honor should have dismissed the action. This contention presents the inquiry whether there was any evidence that the elevator was defective in its original construction or had become so by use, and whether there was any evidence of negligence in failing to inspect the elevator.

We approve the instruction given by his Honor in respect to the duty of the employer to furnish to his employee safe machinery and appliances. "When one enters the service of another it becomes the duty of the employer to provide safe appliances for his use. It also becomes the duty of the employee from time to time to give inspection to these appliances and to see that they are kept in proper repair. It is

not the duty of the master to provide the safest and newest or best appliances, but the duty which the law imposes upon him is that he furnish reasonably safe appliances, such as are in general use, and that he give such inspection to them as, from the nature of the appliances and the circumstances connected therewith, a man of ordinary prudence and judgment would have given." This charge is amply sustained by the authorities. Labatt Master and Servant, section 14, and cases cited. The principle as applied to elevators used by employees is thus stated by the author of that very excellent work: "An employer may be held liable if the safety devices which he is bound to provide for an elevator designed for the use of his servants prove defective. The employer must also respond in damages if an elevator, which is either conducted specially for the conveyance of the servants or which, though constructed primarily for the carriage of freight, is also used with his acquiescence for the conveyance of servants, is in any other way abnormally dangerous to use." Labatt Master and Servant, section 91; *Boot Co. v. Jerman,* 93 Md., 404, 86 Am. St. Rep., 428; *Chesson v. Lumber Co.,* 118 N. C., 59. The defendant, not controverting the duty which it owed to the plaintiff, insists that there is no evidence in the record proper to be submitted to the jury tending to show a breach of duty; that his Honor should, in response to its motion, have dismissed the action. It will be observed that the complaint avers negligence in that, first, the elevator was defective in its original construction; and, second, that the defendant negligently failed to inspect it; that an inspection would have shown the defective condition of the cable, etc. His Honor could not have dismissed the action because it is conceded that the elevator has been in use eighteen months, during which time the defendant had made no inspection. The motion was therefore properly refused. The defendant, however, excepts to his Honor's charge, for

the same reason upon which the motion to nonsuit the plaintiff is based. His Honor having instructed the jury in respect to both aspects of the case, and the issue being general in its terms, if there is error in the charge in either aspect, the defendant would be entitled to a new trial. This Court could not see upon which view the jury found their verdict. *Pearce v. Fisher,* 133 N. C., 333. This therefore presents the question whether there was any evidence of a defective construction of the elevator. His Honor instructed the jury that the burden of proof was upon the plaintiff—that he must show to them by the greater weight of the evidence that there was negligence on the part of the defendant, and that such negligence was the proximate cause of the injury. The elevator was operated by a wire cable which ran over a pulley; there was a weight in a box two feet by six inches at the back of the elevator on the side of the wall, and this box ran from the bottom to the upper floor; the weight ascended and descended as the elevator ascended and descended. A rope was used in pulling the elevator up. The cable was fastened to the weight, went through an eye, and lapped back some eighteen inches; the weight had torn some places in the shaft or box more than at other places; the marks were fresh; the shaft was boxed up all the way except a few feet at the top; shaft was made of rough, uneven planks. The lapped portion of the cable was fastened with four clamps screwed together with bolts and nuts; one clamp held the cable ends together and another fastened between that and the weight. The clamps after the accident seemed to be all right, and seemed to be securely fixed together, but the rope had slipped through; the clamps were not loose; the end of the cable was frayed. The same clamps were used in fastening the cable back after the accident. The plaintiff insists that this testimony entitled him to go to the jury upon the allegation of a defective construction of the elevator. He

relies upon the principle announced by *Gaston, J.*, in *Ellis v. Railroad*, 24 N. C., 138, that, although the burden is on the plaintiff to show negligence causing damage, when he shows damage resulting from the act of the defendant, which act with the exertion of proper care does not ordinarily produce damage, he makes out a *prima facie* case of negligence which cannot be repelled but by proof of care or of some extraordinary accident which renders care useless." This principle has been frequently applied in this State. *Aycock v. Railroad*, 89 N. C., 321, and other cases. Applied to actions of this character the doctrine is thus stated by Labatt, section 834: "The rationale of this doctrine (spoken of in the cases as *res ipsa loquitur*) is that in some cases the very nature of the action may of itself, and through the presumption it carries, supply the requisite proof. It is applicable when under the circumstances shown the accident presumably would not have happened if due care had been exercised. Its essential import is that, on the facts proved, the plaintiff has made out a *prima facie* case, without direct proof of negligence. * * * The doctrine does not dispense with the rule that the party who alleges negligence must prove it. It merely determines the mode of proving it, or what shall be *prima facie* evidence of negligence." While it is true that the courts uniformly hold that a person or corporation operating an elevator for passengers are held to the highest degree of care, the same as common carriers, whereas one operating a freight elevator upon which employees ride in the discharge of their duty are held to a lower degree of care, this distinction does not affect the application of the doctrine of *res ipsa loquitur*. *Houston v. Brush*, 66 Vt., 346. Actions for injuries in either case are founded upon the averments of negligence—a breach of duty—the mode of proof may be the same. It may be that exculpatory evidence would be different. A defendant might be exonerated by showing a

degree of care in one case which would be insufficient in the other. It is by no means clear that in employment where human life is concerned and exposed, the distinction in regard to the degree of care is well founded. "When an accident has occurred, and the physical facts surrounding are such as to create a reasonable probability that the accident was the result of negligence in such case, the physical facts themselves are evidential and furnish what the law terms evidence of negligence in conformity with the maxim *res ipsa loquitur.*" *Houston v. Brush,* 66 Vt., 331.

In the note to *Huey v. Gahlenbec,* 6 Am. St. Rep., 792, the annotator says: "In such case, however, it is hardly accurate to say that negligence is presumed from the mere fact of the injury, but rather that it may be inferred from the facts and circumstances disclosed in the absence of evidence showing that it occurred without the fault of the defendant. Such a case comes within the principle of *res ipsa loquitur:* the facts and circumstances speak for themselves, and in the absence of explanation or disproof give rise to the inference of negligence." The doctrine is well illustrated in the case of *Houston v. Brush, supra,* the Court, *Thompson, J.*, after discussing the authorities and the reason upon which the doctrine is based, saying: "In the case at bar the defendants owed the requisite duty to the plaintiff to bring the case within the rule. It is evident that the accident would not have occurred if the pin had not worked out so as to cause the wheel to fall. For aught that appears, the pin would not have worked out if it had been securely fastened into the block when the block was first attached to the derrick and had been subsequently kept in that condition. It is not claimed that the pin could not have been fastened into the block so that it could not have worked out as it did. It did not appear that any new force or unforeseen or purely accidental occurrence intervened to remove the covering from

the head of the pin, thus causing the accident, but it occurred while the derrick was being put to its ordinary use. * * It was under the care and management of themselves (defendants) and their servants. The working out of the pin was an accident which, in the ordinary course of things, does not occur if those who have the care and management of a derrick use proper care. The case standing thus, we think the jury had a right to consider the fact that the pin came out as it did, and from it draw the inference that the defendants had failed to exercise ordinary care."

In *Boot Co. v. Jumar, supra,* the Court said: "If the jury believed that maintaining the sheathing over the elevator, and especially over the portion of it where the shifting ropes were located, made its operation in that condition dangerous, that was itself a defect that might have been discovered by the use of ordinary care and diligence in inspecting the elevator."

In *Windleman v. Colladay,* 88 Md., 78, the plaintiff, an employee, was injured by the falling of a dumb-waiter through a shaft running from the first to the fifth floor. The fall was occasioned by the breaking of the rope holding the dumb-waiter, but there was no evidence to show how or why the rope broke. It was held that the jury were authorized to infer from the fall of the dumb-waiter, unexplained, that the injury was caused by the negligence of the defendant in not providing safe appliances." The Court said: "When something occurs which, in the ordinary course of events would not occur without negligence, then the familiar doctrine of *res ipsa loquitur* is applied. This doctrine is particularly applicable to cases in which bodies fall, and fall in places where they are liable to do injury."

In this case the contention was made that the doctrine of *res ipsa loquitur* did not apply between master and servant. It was rejected, the Court saying: "No authority was cited for this contention in the Court below and none can be

found." *Howser v. Railroad,* 80 Md., 148, 27 L. R. A., 151, 45 Am. St. Rep., 332; *Malcairus v. Janesville,* 67 Wis., page 25; *Posey v. Scoville,* 10 Fed. Rep., 140. In *Guloch v. Edelmeyer,* 15 Jones & S., 292 (88 N. Y., 645), it was held that "when an elevator fell without any apparent cause and injured the plaintiff, as ordinarily an elevator properly constructed and properly managed does not fall, and as that elevator did fall, the presumption is that there was something wrong either with the elevator or with the management of it, and that presumption would warrant a verdict for the plaintiff unless it were rebutted by the defendant's evidence." The doctrine was applied in *Griffin v. Railroad,* 148 Mass., 143, 1 L. R. A., 698, 12 Am. St. Rep., 526, to the unexplained spreading of the coupling link resulting in the separation of cars causing injury to an employee. It is said that while, either from the facts connected with the transaction, the manner in which the links spread, their appearance after the accident, or other circumstances, the jury could find that there was no negligence, yet the plaintiff was entitled to go to the jury. In *Folk v. Schaffer,* 186 Pa., 253, the injury was caused by the knot of a rope becoming untied and slipping. "There was no direct evidence of want of care in tying the knot, and the conclusion that it was improperly tied was an inference from the fact that it became untied. Ordinarily an accident would not have happened as this did if care had been exercised in tying the ropes. There was no difficulty in making them secure. Under the circumstances shown by the plaintiff the burden was thrown on the defendant to show that due care had been used, and in the absence of any explanation the jury might infer want of care. The defendants were not required to satisfactorily explain the cause of the accident, but they were bound to rebut the presumption of negligence arising from the attendant circumstances."

Threadwell v. Whittier, 80 Cal., 574, 5 L. R. A., 498, 13 Am. St. Rep., 175; *Springer v. Ford,* 189 Ill., 430, 52 L. R. A., 930, 82 Am. St. Rep., 464. In *Kearney v. Railroad,* 5 L. R. (Q. B.), 411, *Cockburn, C. J.,* says: "Now we have the fact that a brick falls out of this structure and injures the plaintiff. The proximate cause appears to have been the looseness of the brick and the vibration of the train passing over the bridge acting upon the defective condition of the brick. It is clear therefore that the structure in reference to this brick was out of repair. It is clear that it was incumbent on the defendant to use reasonable care and diligence, and I think the brick being loose affords *prima facie* a presumption that they had not used reasonable care and diligence." *Scott v. Dock Co.,* Com. Law Rep. (N. S., 134, 320). In the light of the foregoing and many other authorities, his Honor correctly submitted the question of the defective construction of the elevator to the jury. It appears that the weights which should have ascended and descended, free from obstruction or unnecessary friction, struck against the sides of the box or shaft until they produced the condition described by the witness. The shaft or box was made of rough, uneven planks; how far this contributed to the rope slipping was for the consideration of the jury. They may well have found that in such respect the elevator, which includes all of its parts, was defective in its construction. The principle of *res ipsa loquitur* in such cases carries the question of negligence to the jury, not relieving the plaintiff of the burden of proof, and not, we think, raising any presumption in his favor, but simply entitling the jury, in view of all the circumstances and conditions as shown by the plaintiff's evidence, to infer negligence and say whether upon all of the evidence the plaintiff has sustained his allegation. His Honor, in view of this principle, correctly said to the jury in response to defendant's request: "Negligence on the part

of defendant is not to be inferred from the mere fact that an accident occurred, and that in consequence thereof the plaintiff was injured," etc. In regard to the second proposition, regarding the duty of inspection, we are of opinion, both upon reason and authority, that a failure to inspect an elevator approaches very near, if it does not constitute, negligence. The law is fully and ably discussed in Labatt on Master and Servant, chapter 11. "Negligence on the part of the master may consist of acts of omission or of commission, and it necessarily follows that the continuing duty of inspection and supervision rests on the master. It will not do to say that, having furnished suitable and proper machinery and appliances, the master can thereafter remain passive so long as they work well and seem safe. The duty of inspection is affirmative and must be continuously fulfilled and positively performed. Anything short of this would not be ordinary care. The duty of inspection being a positive and affirmative duty, to be continuously performed by the defendants, the Court could not say as a matter of law how often such inspection should have taken place, or that it was proper to omit it at some particular time. It was for the jury to say whether the defendants had used reasonable care in this respect. *Houston v. Brush, supra;* Labatt, 157. We have, after a somewhat exhaustive examination of the authorities, found no case in which a failure to inspect an elevator for more than four months has been held sufficient to excuse the defendant. Labatt, section 158, note 6—"Elevator." A plaintiff was permitted to recover for injury where the clamp to which a derrick guy rope was fastened was inspected only once a week. *Welch v. Cornell,* 63 N. Y., 44.

In *McGuigan v. Beatty,* 186 Pa., 329, a failure to inspect a rope which held the weight for six months was evidence of negligence, the Court saying: "In addition to this there was an entire absence of testimony that the defendant had ever

inspected the rope, and the absence of such proof affords an inference that the duty to inspect had been neglected." "An elevator needs, and should have, constant care and inspection. The friction of the rope is constantly wearing the strands and when they part it is necessarily weakened." *Bier v. Mfg. Co.*, 130 Pa., 446. His Honor's charge in respect to the duty of inspection is in accord with the authorities. A careful examination of the entire charge shows that the principles given to the jury for their guidance and the contentions of the parties were stated with great clearness and accuracy. The defendant, however, says that the plaintiff assumed the risk incident to his employment in the use of the elevator, and that he was guilty of contributory negligence. The last defense, if sustained by any evidence, is not open to the defendant, as it tendered no issue upon the question. It is always an affirmative defense and the defendant carries the laboring oar. We find no evidence to sustain the plea if presented. Without discussing the question as to whether the doctrine known as assumption of risk comes within the same rule, we have no hesitation in holding that there is nothing in the evidence to sustain the defense. *Appleton, J.*, in *Buzzell v. Mfg. Co.*, 48 Me., 113, 77 Am. Dec., 212, says: "The employee assumes the risks, more or less hazardous, of the service in which he is employed, but he has a right to presume that all proper attention shall be given to his safety, and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation and preventable by ordinary care and precaution on the part of his employer." There is no suggestion that the plaintiff knew of any defect in the elevator or any of the appliances for its operation, or that any duty was imposed upon him to inspect it. There is no aspect of the evidence in which the plaintiff can be said to have assumed the risk incident to the negligence of the defendant. *Lloyd v. Hanes*, 126 N. C.,

359. The defendant's first prayer was properly refused because there was no evidence to sustain it. The sixth prayer was substantially given, the others were given as asked.

Upon a careful examination of the entire record and the defendant's exceptions and assignments we find no error. The judgment must be

Affirmed.

COWLES v. LOVIN.

(Filed May 24, 1904).

1. DOCUMENTARY EVIDENCE—*Ejectment.*

Plats and certificates of a survey, not being identified or explained, are not competent evidence to show the location of land.

2. EVIDENCE—*Admissions—Harmless Error.*

The admission of incompetent evidence, which is subsequently excluded, is harmless error.

3. EXCEPTIONS AND OBJECTIONS—*Instructions—Appeal—Case on Appeal.*

Where the case on appeal states that an instruction was not given as set forth in an exception, it will not be considered.

4. INSTRUCTIONS—*Exceptions and Objections.*

The mere omission to charge on a particular point is not ground for exception after verdict, unless the court was requested in apt time to give the instruction.

ACTION by Calvin J. Cowles against S. B. Lovin, heard by *Judge W. A. Hoke* and a jury, at Fall Term, 1903, of the Superior Court of GRAHAM County. From a judgment for the defendant the plaintiff appealed.

Dillard & Bell and *T. A. Morphew,* for the plaintiff.
E. B. Norvell, for the defendant.

WALKER, J. This action was brought to recover possession of several tracts of land described in the complaint. The plaintiff, in support of his title and right to possession, introduced in evidence certain grants and mesne conveyances connecting his title with those grants. There was evidence tending to show that the grants and deeds covered the *locus in quo.* The defendant resisted the plaintiff's recovery upon the ground (1) that it had not been sufficiently shown that his paper title embraced the land in dispute, and (2) that the defendant and those under whom he claimed had been in adverse possession of the land for seven years under color of title. The Court held that there was no evidence to sustain the defendant's second ground of defense, and, that being eliminated, the case turned entirely upon the question whether the plaintiff had sufficiently located the grants under which he claimed the land. The Court charged the jury fully on the question of boundary, and left it to them upon the evidence to say whether the descriptions in the grants introduced by the plaintiff included the disputed land. The jury, in answer to the issue submitted to them, found that they did not, and, judgment for the defendant having been entered on the verdict, the plaintiff excepted and appealed. In order to locate the grants the plaintiff offered in evidence certificates of survey made by H. P. Hyde to which certain plats were annexed. The certificates were in the handwriting of Hyde, who was County Surveyor when they were made. Hyde was living in the State of Texas at the time of the trial. The defendant objected to this evidence and it was excluded. This is the subject of the plaintiff's first exception. The deposition of Hyde, who had made a survey under order of the Court in this case, was taken and read at

the trial, but no reference was made therein to the plats and certificates. The latter show the location of the tracts of land as claimed by the plaintiff. It was not shown, or at least it does not appear in the case, at what time or under what circumstances or for what purpose the plats and certificates were made by Hyde. He was examined as a witness before a commissioner, and his deposition was a part of the evidence. It does not appear therefrom that he was asked any question in regard to the plats and certificates, or that any attempt was made to identify or explain them so as to make them admissible under any known rule of evidence. They are nothing more than the written declarations of a third person, who is living, as to the boundaries of the land. After a most careful consideration of the argument and authorities cited by the plaintiffs in support of the competency, we do not see upon what principle they are admissible. The ruling of the Court by which they were excluded was correct. *Burwell v. Sneed*, 104 N. C., 118; *Dobson v. Whisenhunt*, 101 N. C., 645; *Ray v. Castle*, 79 N. C., 580; *Perkins v. Brinkley*, 133 N. C., 348. This was the principal exception of the plaintiff, as we take it.

The second and third exceptions are manifestly untenable. The will of Hooper and the deed of Carver, Sheriff, to Cooper, were introduced by the defendant, and as they were excluded by the subsequent ruling of the Court from the case, the error, if there was any, in admitting them originally, was cured or, at least, was harmless.

It is stated in the case that the instruction of the Court as to the rule admitting hearsay evidence of boundary is not correctly set out in the plaintiff's fourth exception. This statement is sufficient to dispose of the exception, but we have examined the charge of the Court to which we suppose the fourth and fifth exceptions were taken and find no error therein. We think the Court distinguished properly between

reputation and hearsay evidence in respect to the location of boundaries. *Dobson v. Finley*, 53 N. C., 495; *Shaffer v. Gaynor*, 117 N. C., 15; *Westfelt v. Adams*, 131 N. C., 379. If there were any error in the charge relating to reputation and hearsay as proof of boundary we do not see how the plaintiff could be prejudiced by it. No phase of the case is presented in the record, as it appears to us, to which the exception, if otherwise properly taken, could be pertinent.

The remaining exceptions are based upon the alleged failure, not the refusal, of the Court to give certain specified instructions. The rule, without any exception applicable to this case, is that a mere omission to charge upon a particular point is not ground of exception after verdict unless the Court was requested in apt time to give the instruction. *McKinnin v. Morrison*, 104 N. C., 354; *Russell v. Railroad*, 118 N. C., 1098; *Howard v Turner*, 125 N. C., 107; Clark's Code (3 Ed.), pages 535, 536.

The issues were sufficient to support the judgment, and they afforded the plaintiff ample opportunity to present any phase of the case arising upon the evidence. This is all that is required in submitting issues to the jury. We have not been able to discover any error in the rulings of the Court.

No Error.

BRITTAIN v. WESTHALL.

(Filed May 24, 1904).

1. AGENCY—*Principal and Agent—Sufficiency of Evidence.*

In this action to recover a balance due for lumber, the evidence is sufficient to be submitted to the jury on the question whether the buyer was the agent of the defendant.

2. AGENCY—*Principal and Agent—Evidence—Notice.*

If a principal receives goods purchased by an agent and appropriates them to his use, he is liable therefor, unless he can show that he furnished his agent with the necessary funds, but that the agent bought on credit, of which fact the principal had no notice.

3. AGENCY—*Corroborative Evidence.*

Checks issued by an agent bearing an entry in the hand-writing of the plaintiff that they were given for timber bought for the defendant, are competent only to corroborate the evidence of the plaintiff that he was told so by the agent.

ACTION by D. M. Brittain against W. H. Westhall, heard by *Judge W. H. Neal* and a jury, at February Term,, 1904, of the Superior Court of CATAWBA County. From a judgment for the defendant the plaintiff appealed.

L. L. Witherspoon and *M. H. Yount*, for the plaintiff.
Self & Whitener, for the defendant.

WALKER, J. The plaintiff brought this action before a justice of the peace to recover the sum of $182, the balance claimed to be due for lumber sold and delivered to the defendant through one J. A. Townsend, who, the plaintiff alleged, was the agent of defendant to buy the lumber, but this allegation was denied by the defendant, and he also denied

that he is indebted to the plaintiff in any amount. The justice gave judgment for the plaintiff and the defendant appealed, and the Superior Court, after hearing the evidence, nonsuited the plaintiff on motion of the defendant and the latter excepted and appealed.

The case turns upon the question whether the said Townsend, at the time the lumber was purchased, was the agent of the plaintiff and authorized to buy for him as he did. In order to establish the affirmative of this issue joined between the parties, the plaintiff introduced in evidence an agreement between Townsend and Westhall, dated January 13, 1903, by which the former agreed to ship to the latter all the lumber to be manufactured from timber taken from, and to be taken from, the land described in a certain deed of trust made by Townsend to A. S. Abernathy, as well as from all other land the timber on which the said Westhall had already contracted or thereafter contracted to buy, and all other lumber which Townsend should buy from any and all other persons. It was further agreed that Westhall should credit Townsend on the debt secured by the deed of trust with the money due for lumber manufactured from timber cut on the land described in the deed of trust at certain prices specified in the contract, and that Townsend should receive credit at the same prices for the lumber bought by him and shipped to the defendant with certain deductions.

The contract contains this clause: "Said party of the second part is to furnish to the party of the first part, at his discretion, such sums of money as may be necessary for him, the said party of the first part, to pay for such lumber as he may buy from such other person or persons, but the said party of the first part shall buy such lumber only at such prices as shall be agreed upon between him and the party of the second part, and said purchases of lumber so made by the party of the first part shall always be in the name of and for

the party of the second part, in whom the title shall always be and remain. It is understood and agreed between the parties that the party of the second part is not to pay for or become chargeable with the cost of logging or manufacturing into lumber the timber taken from said land mentioned and described in said deed of trust, or for the timber bought by or to be bought by the party of the second part, nor is he to pay for or become chargeable with the cost of hauling the timber from said land to the place of manufacturing the same into lumber, or for hauling said lumber from the place of manufacture to the place of shipment."

The plaintiff, examined in his own behalf, testified that he sold the lumber in 1903 to Townsend, who said that he was buying it for Westhall; that he sold it on Westhall's credit, and Townsend said that Westhall was to furnish the money. The plaintiff hauled the lumber to the railroad station and turned it over to Townsend, who paid for it with checks drawn by him on the bank payable to the plaintiff's order. On the face of each check was this endorsement in the plaintiff's handwriting: "This check for lumber bought for W. H. Westhall." The defendant objected to the introduction of the checks; the objection was overruled and the defendant excepted. The other testimony was not objected to. The plaintiff further testified that he had been paid $250 on the contract and sale of the lumber, and that there is still due him a balance of $182 by the defendant. The latter told the plaintiff that he had possession of a part of the lumber, and the plaintiff saw about 10,000 feet of the lumber in the possession of the defendant after he took charge of Townsend's property. The lumber was worth $10.50 per thousand feet. Townsend had become a bankrupt and left the State and the Court ordered his property to be turned over to the plaintiff. The plaintiff knew nothing of the written contract or its contents until after he had sold the lumber

to Townsend. He relied on the latter's statement that he was buying for Westhall.

A witness, A. S. Abernathy, testified that he had a conversation with the plaintiff before this suit was brought, in which he said that Townsend told him he bought the lumber for Westhall, though the plaintiff did not claim that Westhall was liable.

It is well settled that on a motion to nonsuit or to dismiss under the statute, which is like a demurrer to evidence, the Court is not permitted to pass upon the weight of the evidence, but the evidence must be accepted as true and construed in the light most favorable to the plaintiff, and every fact which it tends to prove must be taken as established, as the jury, if the case had been submitted to them, might have found those facts upon the testimony. *Purnell v. Railroad*, 122 N. C., 832; *Hopkins v. Railroad*, 131 N. C., 463. Tested by this rule, we think there was some evidence which tended to show that Townsend was acting as agent for the defendant when he bought the lumber. The clause in the contract between Townsend and the defendant under which the latter agreed to furnish the money with which Townsend was to buy the lumber, the title to the lumber to remain in the defendant, the prices to be fixed by agreement between them and the purchases to be made for and in the name of the defendant, was evidence fit to be considered by the jury upon the question of agency. If Townsend was buying the lumber for the purpose of selling it to the defendant, such a stipulation as the one we have just mentioned would hardly have been inserted in the contract. If such was the nature of the transaction, why did the defendant furnish the money to make the purchases and require that the lumber should be bought in his name and for him and that the title should be in him. This is rather an unusual method of buying property through one who is not the agent of the purchaser,

but who is buying for himself for the purpose of reselling. If Townsend was buying on his own account, but under an agreement to sell the lumber so bought by him to the defendant, we do not see why the purchase should be made for the defendant and in his name, and why the title should vest in the defendant at the very time the purchase was made. It may be that all this can be explained, but it at least shows that the plaintiff is entitled to have the contract submitted to the jury for their consideration, in connection with any other evidence which may tend to strengthen or weaken the argument based upon it.

But the plaintiff himself testified that he sold the lumber to Townsend and Westhall under the contract; that Townsend said he was buying the lumber for Westhall, who furnished the money, and the plaintiff further testified that he sold the lumber on Westhall's credit. This evidence was not objected to by the defendant, and we are unable to see why it was not proper for the jury to consider it. It is true that an agency to buy for cash does not imply authority in the agent to pledge the credit of the principal. An agent can only contract for his principal within the limit of his authority, and persons dealing with an agent having limited powers must generally inquire as to the extent of his authority. But if the agent is authorized to buy for cash, to be furnished by the principal, and he violates his instructions and buys on credit, and the principal thereafter receives the goods so bought by his agent and appropriates them to his own use, he is liable for the price unless he can show that he furnished his agent with the necessary funds to buy the lumber and the latter nevertheless bought on a credit, and that the principal received the goods without any notice of that fact and will be prejudiced if he is made to pay for them.

In this case there is evidence that the defendant had the lumber, or at least some of it, in his possession, and told

the plaintiff that he had some of it, and it does not appear whether he had supplied his alleged agent with sufficient funds to make the purchases from time to time. Surely he should not be allowed to keep the lumber if he had failed in this respect and the lumber had not been paid for. *Patton v. Brittain,* 32 N. C., 8; *Miller v. Lumber Co.,* 66 N. C., 503; *Brown v. Smith,* 67 N. C., 245.

There is evidence to the effect that the defendant stated to the plaintiff that the property was given to him by order of the Court, but the jury might have rejected this testimony and found the facts in accordance with the other testimony in the case and the plaintiff's contention, and the rule is that the plaintiff is entitled to have the case go to the jury, if, in any view of the evidence, or by any combination of the facts which the testimony tends to prove, he may be able to recover.

The evidence in the case in support of the plaintiff's cause of action may not be very conclusive, and the defendant may show that he is the rightful owner of the lumber, but we are not at liberty to express any opinion as to these matters, nor are we permitted to weigh the testimony and decide where the preponderance is. We can only pass upon the question whether there was any evidence legally sufficient to be submitted to the jury for the purpose of sustaining the plaintiff's side of the issue. We think there was some evidence of that character upon the record as now presented. The entries on the checks could be competent only in corroboration of the plaintiff, who testified that Townsend told him he was buying for Westhall, and he (the plaintiff) sold the lumber on Westhall's credit. We do not now perceive upon what ground they can be competent as substantive testimony. The mere declaration of the plaintiff that the checks were given for lumber bought for Westhall is not competent even to prove that they were so given, as against the defendant,

nor that Townsend was authorized to buy on the credit of Westhall, nor to prove any other material fact. It is merely an unsworn declaration, which is not substantive proof, and the fact that the checks went into the possession of Westhall does not change its character or impart to it probative force.

The judgment of nonsuit must be set aside and a new trial awarded.

Error.

CARTER v. RAILROAD CO.

(Filed May 24, 1904).

1. CONTRIBUTORY NEGLIGENCE—*Railroads.*

One walking or sitting or lying down on a railroad track is guilty of contributory negligence.

2. NEGLIGENCE—*Nonsuit—Sufficiency of Evidence.*

In this action to recover damages for the death of the intestate, the evidence of negligence by the railroad is sufficient to be submitted to the jury.

3. NEGLIGENCE—*Contributory Negligence—"Last Clear Chance."*

Where the evidence tends to show that the intestate was helpless on the railroad track and could have been seen in time to stop the train, the plaintiff may recover for the death of the intestate on the ground of the "last clear chance."

ACTION by W. W. Carter, administrator of G. Carrigan, against the Southern Railway Company, heard by *Judge W. R. Allen,* at November Term, 1903, of the Superior Court of IREDELL County. From a judgment for the plaintiff, the defendant appealed.

Armfield & Turner and *J. F. Gamble,* for the plaintiff.
L. C. Caldwell, for the defendant.

MONTGOMERY, J. All of the exceptions of the defendant may be considered under the one to the refusal of the Court below to dismiss the action on the motion of the defendant to have the plaintiff nonsuited because there was no evidence tending to show negligence on the part of the defendant in the killing of the plaintiff's intestate. There was evidence going to show that the intestate was found dead lying right along the side of the railroad track; that blood and flesh and human hair were seen on the track between the rails a few steps from the intestate's body; that one arm and one foot were cut off, the forehead mashed and the scalp torn off, and that the clothing around the middle of the body was stripped off; and besides, that the intestate was intoxicated. The engineer in charge of the engine at the time the intestate was killed testified that he was sitting straight up in the cab, looking ahead through the front window, that the first thing he observed was "a bulk of something rolling into the ditch beside the track."

We are of the opinion that the evidence which we have recited tended to show that the intestate was killed while he was down and helpless upon the track. The evidence of the severed arm and leg went to show that he was run over by the engine, and the engineer's testimony corroborated that view, for, as he said, he was looking straight ahead and did not see the man standing or walking upon the track. Of course the intestate was guilty of contributory negligence, whether he was walking or sitting or lying down on the railroad track when he was killed. *Upton v. Railroad*, 128 N. C., 173, and this Court there said: "The intestate having been negligent, before a recovery can be had against the defendant on the ground of its negligence in not availing itself of the 'last clear chance,' it must be shown by the plaintiff by proper evidence, not simply that the intestate was on the track in the way of the engine, but that he was there apparently

asleep or in other helpless condition, and that the engineer had discovered his condition, or, by keeping a reasonable watchout could have discovered it in time to have prevented the injury, and that after he had discovered it or could by proper watchfulness have had reasonable grounds that such was the condition of the intestate, he failed to use all available means to prevent the injury."

As we have said, the evidence tended to show that the intestate was down upon the track; and there was further evidence for the plaintiff going to show that the intestate could have been seen by the engineer, if he had been looking, a distance of one hundred and fifty yards and in time to have stopped the train and prevented the injury. There was a good deal of evidence to the contrary, but all of it had to be submitted to the jury. In Upton's case, *supra*, the appearance of the body did not indicate that the intestate had been run over by the train, but on the contrary that he was in a sitting position on the end of a cross-tie with his face from the track. There was no error in the course of the trial and the judgment must be

Affirmed.

GARSEED v. STERNBERGER.

(Filed May 24, 1904).

GAMING CONTRACTS—*Cotton Futures—Acts 1889, ch. 221.*

Where a person buys cotton "futures" for another and suffers loss, he cannot maintain an action for reimbursement.

ACTION by E. T. Garseed against H. Sternberger, heard by *Judge O. H. Allen* and a jury, at September Term, 1903, of the Superior Court of GUILFORD County. From a judgment for the defendant the plaintiff appealed.

J. N. Staples, for the plaintiff.
J. A. Long and *J. E. Long,* for the defendant.

CLARK, C. J. The defendant desiring to engage in buying cotton "futures" without being known, requested the plaintiff to buy them for him through the plaintiff's own broker in New York. Both the plaintiff and defendant lived in Greensboro, N. C. The defendant agreed to furnish all the money necessary for these transactions and to guarantee the plaintiff against loss. Several of these transactions occurred, the defendant using the plaintiff's name with his consent and the orders being sent direct by the defendant to the plaintiff's brokers. After several such transactions, in this particular one the defendant gave the plaintiff a check for $500 and told him he was going to buy 500 bales "June cotton." The defendant sent his instructions direct to the plaintiff's brokers. There was a loss of $626.28 on this contract being closed out, which the New York brokers charged up to the plaintiff. The plaintiff thereupon called upon the defendant to reimburse him the amount ($126.52) in excess of the sum of $500, which had been handed

him by the defendant. The defendant did not, after the loss, request the plaintiff to pay the $126.28 nor promise after such loss to reimburse the plaintiff, but on the contrary denied liability, alleging that the loss was caused by the failure of the plaintiff's brokers to obey instructions. The plaintiff began this action before a justice of the peace to recover the said sum of $126.52 as money paid to the defendant's use. The defendant pleaded that, the transaction being illegal, the plaintiff could not recover. Upon the plaintiff's testimony as above the defendant demurred to the evidence. The Court sustained the demurrer and dismissed the action. In this there was no error.

In Clark on Contracts, 501, it is said: "If a broker or *other agent* is employed to carry out an illegal transaction, and is privy to the unlawful design, and by virtue of his employment performs services, makes disbursements, suffers losses, or incurs liabilities, he has no remedy against his principal"—citing Greenhood Pub. Pol., 110 (where the cases are collected); *Harvey v. Merrill*, 150 Mass., 1, 5 L. R. A., 200, 15 Am. St. Rep., 159; *Gibbs v. Gas Co.*, 130 U. S., 396, and numerous other cases; saying further, "not only is this true, but it has been held that any express promise made by the principal to reimburse him is void," citing *Embrey v. Jemison*, 131 U. S., 336; *Kahn v. Walton*, 46 Ohio St., 195; *Everingham v. Meighan*, 55 Wis., 354, which sustain the text. But if there could be any doubt on this proposition, our chapter 221, Laws 1889, "to suppress and prevent certain kinds of vicious contracts," puts the matter beyond controversy. Section 1 is very elaborate and forbids all classes and kinds of dealings in "future" contracts, in which, as in this case, the transaction is not a *bona fide* purchase of commodities for actual future delivery, but contemplates a payment or receipt of the difference in the price at the time of delivery from that named in the contract, and

provides that no party "or agent of such party, directly or remotely connected with such contract in any way whatever, shall have or maintain any cause of action on account of any money or other thing of value paid, advanced or hypothecated by him, in connection with or on account of such contract or agency."

Section 3 provides that every person, who is a party to any such contract, "and every person who shall be the agent, directly or indirectly, or any such party in making, or furthering, or effectuating the same, * * * shall be deemed guilty of a misdemeanor, and on conviction in the Superior Court shall be fined not less than $100 nor more than $500 and may be imprisoned in the discretion of the Court." And section 4 visits with like punishment every person who in this State shall "do any act or aid in any way in this State in the making or furthering such contract so made in another State."

No Error.

BOWERS v. TELEGRAPH CO.

(Filed May 24, 1904).

TELEGRAPHS—*Mental Anguish.*

A person cannot recover damages for mental anguish by reason of a telegraph company delaying the delivery of a message relating to business, though mental anguish was suffered by the sender occasioned by the misapprehension as to the meaning of the message.

ACTION by DeWitt Bowers against the Western Union Telegraph Company, heard by *Judge C. M. Cooke* and a jury, at January Term, 1904, of the Superior Court of DURHAM County. From a judgment for the plaintiff the defendant appealed.

J. C. Biggs and *Boone & Reade*, for the plaintiff.
F. H. Busbee & Son, for the defendant.

CLARK, C. J. The plaintiff's mother, Lucy Bowers, sent him the following message: "Come at once. Lucy Bowers." This was given to the telegraph operator at Apex, N. C., soon after 8 A. M., and was delayed in transmission so that it was not delivered to the plaintiff at Durham, N. C., till 11.50 A. M., and after the east-bound train had passed Durham at 9.40 A. M. by which he might have gone to his mother. He left on the afternoon train, but that train not making connection at Cary the plaintiff got off at Morrisville and walked nine miles to his mother's. His mother had been unwell but was not sick enough to have a doctor, and this message was sent not because of illness but because she wished to see her son on business.

The defendant was derelict in taking nearly four hours to transmit a message from Apex to Durham, and, nothing else appearing, the sender might recover back, if she de-

manded and was refused, the twenty-five cents which was paid by her to secure its prompt transmission, for which purpose telegraph companies are granted charters to serve the public convenience. *Kennon v. Telegraph Co.*, 126 N. C., 232. But we see no ground to authorize a recovery by the plaintiff for mental anguish. His mother was not dead nor at the point of death. He knew that, because her name was signed to the dispatch. It was his own misapprehension which caused him any uneasiness, and not the negligence and delay of the defendant. He was not deprived by such delay of the opportunity of seeing his mother, who indeed is still alive. Mental anguish is as real as physical, and recovery in proper cases is allowed of just compensation when anguish, whether physical or mental, is caused by the negligence, default or wrongful act of another. The difficulty of measuring compensation does not bar a recovery for physical anguish nor when the anguish is mental. But if the plaintiff suffered any mental anguish in this case it was not caused by the negligence of the defendant. In refusing to so instruct the jury at the request of the defendant there was error.

The learned counsel for the defendant informs us that more actions for mental anguish are brought in this State than in any other except Texas. This is not in the record, but, if correct, the courts have cause to complain of the additional burden; but counsel certainly do not lose anything thereby and are in nowise to be held responsible for it. The defendant is responsible for any loss in such litigation, for it can effectually prevent recovery in any action by the discharge of its duty in the prompt delivery of telegrams, especially of those whose tenor indicates that either mental anguish or pecuniary loss will be the probable result of a delay in transmission or delivery.

MONTGOMERY, WALKER and CONNOR, JJ., concur in result.

RANGE CO. v. CAMPEN.

(Filed May 24, 1904).

1. INTERSTATE COMMERCE—*Licenses—Sales—Const. U. S., Art. I, sec. 8—Acts 1903, ch. 247.*

The license tax imposed on every itinerant person peddling ranges is a violation of the constitution of the United States to the extent of sales by sample of goods manufactured in another state, shipped into this state and delivered in their original packages.

2. PEDDLERS—*Hawkers—Licenses.*

Where ranges are manufactured in one state and sold by sample in another, neither the person exhibiting the sample nor those making delivery thereof in the original packages are peddlers.

ACTION by the Wrought Iron Range Company against A. B. Campen, heard by *Judge Frederick Moore*, at New Bern, N. C., December 2, 1903.

This action was brought to restrain the collection of a license tax and to recover the property levied upon and seized by the sheriff to enforce the payment of it. The case was heard upon the complaint treated as a case agreed, the facts alleged therein being admitted. The complaint is as follows:

The plaintiff complains of the defendant and alleges:

1. That the Wrought Iron Range Company, the plaintiff in this case, is a corporation duly organized and created under the laws of the State of Missouri, with its general offices located in the city of St. Louis, Mo., in which city and State it also has a factory in which are manufactured all the ranges sold by its traveling salesmen throughout the United States, and the plaintiff has been engaged during the year 1903 in selling ranges in Pamlico County, North Carolina, as is hereinafter set out.

2. That the defendant is the duly qualified and acting Sheriff of Pamlico County, North Carolina.

3. That the manner in which said company has sold all its ranges and transacted all its business in Pamlico County, North Carolina, during the year 1903, prior to the filing of this suit, and the manner in which it proposes to hereinafter sell its ranges and conduct its business so long as it remains in said county and State, is as follows:

The agents employed by plaintiff in the sale of its ranges and the transaction of its business in said county and State are as follows: S. D. Dew, officially designated by plaintiff as division superintendent; ....., officially designated by plaintiff as traveling salesmen, and ....., officially designated by plaintiff as deliveryman. Plaintiff has other salesmen and deliverymen operating in North Carolina, but the names only of those operating in Pamlico County in 1903 are hereinbefore set out.

4. That each and every one of said agents of said plaintiff in said county of Pamlico, State of North Carolina, is paid by the plaintiff for his services to said plaintiff a stipulated and contractual compensation, together with his necessary expenses, while engaged in the sale or delivery of plaintiff's ranges, or any other services rendered by them for said plaintiff in said county and State. Further than this stipulated compensation no one of said agents has any monetary or financial interest whatever in the sales, proceeds of sales, or business transacted by plaintiff in said county and State.

5. That each of said agents hereinbefore referred to as traveling salesmen was furnished by plaintiff with a wagon, team and sample range, all of which were and are the sole and undivided property of plaintiff, and each of said salesmen was assigned to a certain and determinate territory in said Pamlico County by the agent hereinbefore referred to as division superintendent.

6. That each of said traveling salesmen, in his appropriate territory within the limits of said Pamlico County, exhibited his sample range to prospective purchasers, and solicited their orders for ranges similar in all respect to the samples exhibited, to be delivered to purchasers within thirty days from date of said orders. In no instance in said county and State did said traveling salesmen solicit orders for, sell or deliver to any purchaser the sample ranges entrusted to them by plaintiff, nor did either of said salesmen deliver any ranges to purchasers in said county and State, the orders for which had been obtained either by himself or the other traveling salesmen hereinbefore referred to.

7. That in all cases in said county and State where orders were obtained by said traveling salesmen, purchasers were required to sign, and did sign and deliver to said salesmen, two promissory notes of equal amount, and of the same tenor and date, one of which was made payable in November, 1904, and the other in November, 1905, conditioned for the delivery at the premises of the purchaser within thirty days from date of a No. 1900 range, same as sample exhibited, and to be void only upon the condition that said plaintiff refused to deliver said range as specified in notes, and for no other cause whatever.

8. That all orders obtained by said salesmen for the future delivery of ranges under the terms and conditions aforesaid, were, by the respective salesmen who obtained or secured said orders, turned over to plaintiff's agent hereinbefore referred to as division superintendent.

9. That said division superintendent, after investigating the financial conditions of said purchaser, selected such as he regarded as responsible for their contracts, turned their orders over to the deliverymen hereinbefore mentioned, delivered to said deliverymen the ranges ordered by said

purchasers, whereupon said agents proceeded to deliver to said purchasers the ranges according to the terms and conditions specified in the promissory notes hereinbefore mentioned.

10. That for the purpose of making such deliveries, each said deliveryman was furnished with a wagon and team, which were and are the exclusive property of the plaintiff, and said deliverymen, for their services in making said deliveries of ranges, were and are paid a stipulated compensation and their necessary expenses by said plaintiff. Further than the said compensation, said deliverymen have no monetary or financial interest in the sale, proceeds of sales, or business of said plaintiff.

11. That all ranges sold by the plaintiff or its agents in said county and State were sold and delivered to its customers in the original form or packages in which they were shipped into the State of North Carolina from plaintiff's factory in St. Louis, Missouri. All of said ranges were shipped in car-load lots, each car containing sixty separate and distinct ranges, and consigned to plaintiff at New Bern, in Craven County, North Carolina, in care of its said agent, S. H. Dew.

12. That upon the arrival of said ranges at said New Bern, they were unloaded by plaintiff's agents aforesaid and stored in the warehouse of the Atlantic and North Carolina Railroad Company, the common carrier by which they were delivered at said New Bern, and held subject to plaintiff's order.

13. That no ranges were sold or offered for sale at said warehouse, but were taken therefrom only as hereinbefore mentioned, for the purpose of filling orders obtained by the salesmen aforesaid.

14. That all of said ranges used in the transaction of

plaintiff's business in Pamlico County, North Carolina, were unloaded from the cars of the common carrier at said New Bern in the precise form or package in which they were placed in the cars of the common carrier at St. Louis, Missouri, and placed in said warehouse in the same form or packages, and were taken from said warehouse and loaded upon plaintiff's delivery wagons in the same form or packages in which they were shipped from St. Louis, and delivered to plaintiff's customers in Pamlico County in the identical and original form or packages in which they were shipped into the State of North Carolina.

15. That the defendant, claiming the right to do so under section 36, chapter 247, North Carolina Public Laws of 1903, demanded from plaintiff a license tax of one hundred dollars for the business of peddling ranges in said county and State, for one year, ending May 31, 1904, and levied on and seized the property of plaintiff for the purpose of satisfying said tax, and still has the property in his possession sufficient to satisfy said tax, and will sell and dispose of said property to satisfy said tax unless restrained by this Court.

16. That section 36, chapter 247, Public Laws of 1903, in so far as it applied to plaintiff, and the business transacted by it in Pamlico County, North Carolina, is in conflict with Article I, section 8, paragraph 3, of the Constitution of the United States, and therefore, as to the plaintiff and its said business, illegal and unconstitutional, absolutely null, void and invalid.

17. That all ranges sold by its traveling salesmen in said county and State were shipped into said city of New Bern, Craven County, and State, before any of said ranges had been sold, or order for their sale had been solicited, by its salesmen aforesaid. Plaintiff has no place of business in Pamlico

County, or elsewhere in the State of North Carolina, except as hereinbefore stated.

18. That the said seizure of plaintiff's property is for the purpose of collecting a tax levied for an illegal and unconstitutional purpose, and said levy and seizure is illegal, void and wrongful, and the defendant is threatening to sell plaintiff's property and will sell it to pay said illegal tax, unless restrained by this Court, and the plaintiff will be irreparably injured and damaged by said illegal and wrongful acts of defendant.

19. That a summons has been issued in this action.

Wherefore, the plaintiff demands judgment that the defendant be restrained and enjoined from collecting said tax; that he be restrained from selling or disposing of the property now in his hands belonging to the plaintiff; that the defendant return to the plaintiff the property now in his hands; for costs and for general relief.

The following entries appear on the record: 1. The parties waive a jury trial and agree that the Court may hear the case out of term, as of the Fall Term, 1903, of the Superior Court of Pamlico County, and render a final judgment herein. 2. The parties agree that the facts alleged in the complaint are true, and also agree that the Court may enter a final judgment on them. Whereupon, argument is heard upon both sides, and it is therefore considered by the Court and adjudged that the restraining order and injunction heretofore issued be and the same is hereby dissolved, and that the defendant go without day and recover his costs of action of the plaintiff and the surety to his prosecution bond. Plaintiff excepted and appealed.

Simmons & Ward and *Shepherd & Shepherd*, for the plaintiff.

Robert D. Gilmer, Attorney-General, for the defendant.

WALKER, J., after stating the case. This appeal presents for our consideration the question whether the imposition of a license tax required of the plaintiff under section 36 of the Revenue Act (Acts 1903, chapter 247) is a valid exercise of the taxing power of the State with reference to the plaintiff's particular business as described in the case agreed, and the decision of that question depends upon whether the exaction of the license tax, as a prerequisite to the exercise of the right to sell its ranges in this State, is a regulation of interstate trade or an interference with its free and unrestricted enjoyment within the meaning of the commerce clause of the Constitution of the United States.

It will enable us the better to understand the limitations which have been placed by that clause of the Constitution upon the right of one State to impose taxes upon the sale of goods brought from another State, if we first ascertain what principles have been settled by the adjudications of the court of last resort having jurisdiction to pass upon that question.

In *Robbins v. Shelby Taxing District*, 120 U. S., 489, the following propositions were established: 1. The Constitution having given to Congress the power to regulate commerce among the several States, that power is necessarily exclusive. 2. That where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions, and that any regulation of the subject by the States is repugnant to such freedom. 3. The only way in which commerce between the States can be *legitimately* affected by State laws is when, by virtue of its police power and its jurisdiction over *persons and property within its limits*, it provides for the security of life and property, or imposes taxes upon *persons residing within the State or belonging to its population, or upon avocations pursued*

therein not directly connected with foreign or interstate commerce.

But in making such internal regulations a State cannot impose taxes upon persons passing through the State or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce, nor can it impose such taxes upon property imported into the State from abroad or from another State, and not yet become part of the common mass of property therein; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject.

It seems, therefore, with respect to the importation from other States of goods already sold, no license tax can be levied upon them by the State into which they are brought for delivery to the purchaser until they have been mingled with and form a part of the common mass of the property therein, and, even when they are thus commingled, they are still protected against any discriminating tax laid upon them directly or indirectly as imports or by reason of their having been imported into the State, simply because this would be a regulation of interstate commerce inconsistent with that perfect freedom of trade between the States which Congress, by not legislating otherwise, has clearly indicated should exist. We may concede, for the purpose of this discussion, that there is no discrimination under section 36 of the Revenue Act against goods imported from another State, but that all goods of the classes described in that section, whether imported into the State or originally forming a part of the general mass of property therein, are alike subject to the tax without any distinction whatever, so that persons who sell goods which are brought into the State stand upon a basis of equality with those who sell goods already in the State and forming part of the general mass of its property. Assum-

ing, then, that there has been no discriminating legislation against the sale of imported goods, the question arises as to the time when goods brought into a State for the purpose of sale cease to be articles of interstate commerce so as to become subject to the free and untrammeled exercise of the taxing power of the State.

This question was considered and decided in *Brown v. Maryland,* 12 Wheat., 419, with reference to a tax imposed upon the right to sell goods imported from foreign countries. But the same principle, says *Marshall, C. J.,* applies with equal force to commerce between the States. Referring to the extent of the power, he says: "The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a State but must enter its interior. If the power reaches the interior of a State and may be there exercised, it must be capable of authorizing a sale of those articles which it introduced. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purposes should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the subject of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation but to authorize the importer to sell. We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importa-

tion, as an inseparable incident, is inevitable. If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article in his character of importer must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation." Discussing the particular question as to the time when the goods become incorporated with the common mass of property in the State, he says: "This indictment is against the importers for selling a package of dry goods, in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the State by breaking up his packages and traveling with them as an itinerant peddler. In the first case the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States until he shall have also purchased it from the State. In the last case the tax finds the articles already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them."

We have quoted at some length from this important case, because we understand that the principles therein established have been accepted as authoritative in all subsequent decis-

ions upon this subject. And they have not been in the least changed since they were first announced, except in so far as it was therein intimated that a State could not tax directly and as property imports from another State, as, in this respect, the rule in regard to the taxation of imports from foreign countries and the rule in regard to imports from another State are not the same, as the Constitution expressly prohibits the taxation, in any form, of imports from foreign countries. *Woodruff v. Parham,* 8 Wall., 138. But in all other respects the decision in the case of *Brown v. Maryland* has remained intact. This will appear by reference to the very recent case of *Railroad v. Sims,* 191 U. S., 441. In that case the Court, at page 449, says: "Upon the other hand, for the past seventy-five years, and ever since the original case of *Brown v. Maryland,* 12 Wheat., 419, we have uniformly held that States have no power to tax directly or by license, upon the importer, goods imported from foreign countries or other States, while in their original packages, or before they have become commingled with the general property of the State and lost their distinctive character as imports. In that case a law of Maryland required importers to take out a license before they could be permitted to sell their imported goods. That was declared to be void, not only as a tax upon imports, but as an infringement upon the power of Congress to regulate commerce. The case is one of the most important decided by this Court, and has been adhered to by a uniform series of decisions since that time."

Questions relating to the interference by State regulations with interstate commerce have frequently been before the Supreme Court of the United States, whose decisions upon them are of course controlling with us. It will suffice to examine only a few of the cases decided by that Court in order to determine whether the law under which the license

tax has been imposed upon the plaintiff is in conflict with the commerce clause of the Constitution and therefore invalid.

It requires, we think, only a careful consideration of these cases, and a correct understanding of their distinguishing features, to fix the limit of the State's power of taxing goods imported from other States.

Some general principles have been settled by actual adjudication which enables us to classify the cases arising out of the power asserted by a State to prohibit the importation of goods from other States. This importation may be prohibited, either directly by forbidding the goods to be brought into the State, or indirectly by imposing a tax in such a way as to restrict the enjoyment of the right to import them, such as a license tax, which is required to be paid before the goods are either delivered, under a contract of sale made before the importation began, or sold after the transit is completed and they have reached their destination in the State.

(1) When the goods are imported from a foreign country into one of the States, the State may not levy a tax upon them either directly or indirectly. No tax can be assessed against them as property *ad valorem* or according to any other principle, nor can any license tax be imposed upon the right to sell them, and this exemption continues so long as they remained in the original packages; and after the packages are broken and they become a part of the common mass of property they are still protected against unfriendly legislation which results in any discrimination against them and in favor of the property which has not been imported into the State. *Brown v. Maryland*, 12 Wheat., 419; *May v. New Orleans,* 178 U. S., 496.

(2) The Constitution of the United States declares that "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," and

that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes." It will be seen, from a slight comparison of the two provisions, that the exemption from taxation is more extensive in the case of foreign imports than it is in the case of goods imported from one State into another. In the former case all State taxation on importation is prohibited, while in the latter case it is only forbidden by implication, in so far as it may interfere with the regulation of commerce, over which Congress is given exclusive power and jurisdiction. This is clearly pointed out by *Justice Miller* in *Woodruff v. Parham, supra.* If the tax does not fetter commerce, although it may remotely affect it, it may be levied by the State even if the goods have come from another State. A tax laid directly on the imported goods as property, in like manner and by the same rule as upon other property produced in the State, would be valid if the levy is made after the goods have reached their destination and are at rest in the State. In such a case, and for the purpose of direct taxation, or of such taxation as does not restrict the right of interstate traffic, the imported goods are considered as a part of the general mass of property in the State as soon as they have reached their final destination and are at rest within the State. This principle was restated and applied in the case of *Brown v. Houston,* 114 U. S., 662; *Am. S. & W. Co. v. Speed,* 192 U. S., 500.

(3) We see therefore that the State cannot tax imports from foreign countries at all, and can tax goods from other States only when no discrimination against them and no regulation of commerce results therefrom. In no form of legislation can one State prohibit the importation of goods from another State, provided the commodity the importation of which is forbidden is a legitimate subject of commerce, and this right of importation which is thus protected against

hostile State legislation includes the right to sell the goods in the original packages after they have arrived in the State, and not until such a sale is made do they cease to be articles of interstate commerce and become a part of the general mass of the property in the State. This doctrine was announced in *Brown v. Maryland, supra,* as to foreign imports, and it has been extended by subsequent decisions to imports as between the States, because in this respect both kinds of commerce stand upon the same footing and are protected by the same clause of the Constitution. *Leisy v. Hardin,* 135 U. S., 100; *Lyng v. Mich.,* 135 U. S. 161.

(4) The doctrine that one State cannot directly prohibit the importation into its territory of goods from another State has been extended, or rather applied, to a case where the prohibition was attempted not directly, but by means of a license tax exacted of the importer. In the cases to which we will presently refer, the goods were sold in one State to a person residing in another State and were to be delivered to the purchaser in the latter State. If the importer cannot sell the goods until he has paid for and received a license, the right of importation is in principle as much restricted, and interstate commerce as much regulated, though perhaps not in the same degree, as in the case of an absolute prohibition. *Brown v. Maryland, supra; Robbins v. Shelby Taxing Dist.*, 120 U. S., 489; *Asher v. Texas,* 128 U. S., 129; *Bowman v. Titusville,* 153 U. S., 289; *Shollenberger v. Pa.*, 171 U. S., 1; *Caldwell v. N. C.*, 187 U. S., 622; *Railroad v. Sims*, 191 U. S., 441; *Ex-parte Hough*, 69 Fed. Rep., 330 The case of *State v. Gorman,* 115 N. C., 721, 25 L. R. A., 810, 44 Am. St. Rep., 494, is clearly distinguishable from our case, though the reasoning of the Court in that case seems to sustain our decision in this case.

(5) The only question remaining for us to consider is whether the principle of *Brown v. Maryland, Robbins v.*

Shelby Taxing District, and the other cases just cited, applies to a case like the one at bar, where there is no direct prohibition against the importation of goods from another State nor any license tax exacted of the importer, who, by himself or through his agents, solicits orders by sample for goods to be brought into the State and then delivered, but where the goods are brought into the State, and having reached their destination, and being at rest in the State, are sold from a warehouse of the carrier in the original packages, orders for the goods being first obtained by agents of the importer who solicit the same by exhibiting samples of the goods which are carried from place to place in a wagon, the orders being afterwards filled and deliveries made from the warehouse.

A license tax was required of the plaintiff under section 36 of the Revenue Act of 1903, which is as follows: "On every itinerant person or company peddling clocks, stoves or ranges one hundred dollars per annum for each county in which he or they may peddle the same. The license to be issued by the sheriff of the county, who shall collect said tax and pay the same to the State Treasurer." Section 44 provides that "Any person carrying a wagon, cart or buggy, or travelling on foot for the purpose of exhibiting or delivering any wares or merchandise shall be considered a peddler." Sections 36 and 44 are a part of Schedule B, and section 26 of the Revenue Act, which is the first section of Schedule B, reads as follows: "Taxes in this schedule shall be imposed as license taxes for the privilege of carrying on the business or doing the act named, and nothing in this act contained shall be construed to relieve any person or corporation from the payment of tax as required in the preceding schedule. The license issued under this schedule shall be for twelve months, and shall expire on the 31st day of May of each year."

It will be seen therefore that no person or corporation

has the right to carry on any business taxed under Schedules B and C until the license tax is paid, and every such person or corporation is required to exhibit the license when demanded by the sheriff of the county in which the business is conducted (section 90), and the sheriff is required to demand payment of the license tax from any person or corporation liable for the same, and a failure to pay the same is made a misdemeanor. (Section 87).

It must be admitted that the right to sell is an important and valuable part of the right to import. The right to bring goods into a State for the purpose of selling them there would be of no value if, when they arrive at their destination, the right to sell them is prohibited, and even though there may be no absolute prohibition, any restriction placed upon the right to dispose of the goods is as much an interference with the right to import or interstate commerce, though not perhaps in the same degree, as if the sale of the goods had been altogether forbidden. There is no difference in principle between the two cases. The proposition, as is said in *Brennan v. Titusville*, 153 U. S., 287, that a license tax is a direct burden on interstate commerce is not open to question. "It is clear therefore," says the Court, "that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a State may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent to regulate it." In referring to the case of *Crutcher v. Kentucky*, 141 U. S., 47, the Court says: "Neither license nor indirect taxation of

any kind, nor any system of State regulation, can be imposed upon interstate any more than upon foreign commerce; and all acts of legislation producing any such result are, to that extent, unconstitutional and void." Numerous authorities are cited and commented on by the Court in *Brennan v. Titusville,* which is a very important and instructive case. The conclusion reached was that within the reasoning of the cases cited the license tax imposed upon the defendant for selling by sample goods to be shipped into the State was a direct burden on interstate commerce, and was therefore beyond the power of the State. If the right to sell the imported article is an integral part of the right to import, and an essential element of it, without which it would not be complete, what difference can there be between a sale of the article when it is not in the State and a sale of it after it has been brought within the State, provided it remains in the original package of commerce. A license tax was required of the defendant in *Brown v. Maryland*, 12 Wheat., 419, who was an importer. He resisted the payment of the tax and his contention was sustained.

It will be observed that the tax in that case was declared invalid, not only as being an impost or duty laid on imports from a foreign country but as being an interference with the regulation of commerce. The question is discussed in both aspects and the tax declared illegal upon both grounds. The words which we have already quoted from the masterly and unanswerable opinion of the great *Chief Justice* will be found in that part of it where he is discussing the second objection to the tax urged by the plaintiff in error (Brown), the defendant below, which was based solely upon the ground of its repugnance to that clause of the Constitution committing to Congress the power to regulate commerce with foreign nations and among the several States.

It was also settled by *Brown v. Maryland* that imported

goods preserved their character as imports as long as they remained unsold and in the original packages in which they were imported. "This indictment," it is said in that case, "is against the importer for selling a package of dry goods in the form in which it was imported without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the State by breaking up his packages and traveling with them as an itinerant peddler." 12 Wheat., 443. If, therefore, as said in *Brown v. Maryland,* and reiterated in subsequent cases, a State cannot impose a license tax on the importer, or on his agent who represents him and who would be protected by the same principle, because it is a restriction upon interstate commerce and a regulation thereof, and if the goods continue to be articles of interstate commerce so long as they remain in the original packages and are unsold, it follows that the tax required to be paid by the plaintiff in this case before selling its ranges in the original packages was an unlawful restraint upon its right to import, which included the right to sell in the manner described in the case agreed, and is therefore void.

When we once concede, as we must, that the power of Congress to regulate commerce among the several States does not stop at the external boundary of a State, but must enter its interior and operate there, and that being "co-extensive with the subject on which it acts," its full force is not spent until there is a sale of the article which is imported, and not then if there is any discrimination against the goods because of their foreign character, the conclusion we have reached would seem to be inevitable. We do not think the cases holding that the goods may be taxed as property as soon as they have come to the end of the transit and are at rest in the State conflict with our view of the case. Nor do the peddler cases (*Machine Co. v. Gage*, 100 U. S., 676;

Emert v. Missouri, 156 U. S., 296) have that effect. It does not appear in those two cases that the goods were sold in the original packages, and furthermore the Court bases its decision of them upon the ground that the State was exercising its police power, and the tax was laid in the exercise of that power and not merely for the purpose of raising revenue, as in our case. In *Emert v. Missouri, Justice Gray,* for the Court, says: "There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time." And again, "So far as appears, the only goods in which he was dealing had become part of the mass of property within the State." Emert was taxed strictly as a peddler. In the case we have in hand the plaintiff, acting by its agents, was not a peddler within the meaning of that word as fixed by the common law, that is, a person who sold the very goods he carried with him in his pack, or cart, when traveling about from place to place. This Court has defined "peddling" to be "the occupation of an itinerant vender of goods who sells and delivers the identical goods he carries with him, and not the business of selling by sample and taking orders for goods to be thereafter delivered and to be paid for wholly or in part upon their subsequent delivery." *State v. Lee,* 113 N. C., 681, 37 Am. St. Rep., 649; *State v. Frank,* 130 N. C., 724, 89 Am. St. Rep., 885. It has also held that an occupation similar to plaintiff's is not that "of a peddler in the ordinary meaning of the word." *State v. Ninestein,* 132 N. C., 1039. The mere calling the plaintiff a peddler does not make it a peddler for the purpose of laying a tax upon its business as an importer, which interferes with interstate commerce and is in its essence a regulation of the same. In the language of the Court in *Stockard v. Morgan,* 185 U. S., at page 36: "The name does not alter the character of the transaction, nor prevent the tax thus laid from being a tax upon inter-

state commerce." It is undoubtedly true that the Legislature may define who are peddlers and, in the same act, tax them, as this "is equivalent to imposing a tax upon all persons engaged in the occupations therein specified," or whose occupation may come within the definition given in the statute. *State v. Ninestein,* 132 N. C., at page 1043. The word is there used as a mere designation of the person who carries on the business described, but it does not enlarge a class of persons before well known and having a certain and well-defined calling, so as to confer upon the State a power with reference to the regulation of interstate commerce that it did not before have. The law regards not the name, but the substance of the thing, and will look at the real character of the business in determining whether or not the State's power of taxation has been rightfully exercised. In *Range Co. v. Carver,* 118 N. C., at page 335, it is said that in *Emert v. Missouri, supra,* the Court sustained the right of the Legislature to define who shall be a peddler for the purpose of taxation. That is true, but the Court was referring to taxation by the State within its rightful authority, and not to taxation which substantially interferes with the power of Congress to regulate commerce, though nominally it may not do so. We think the decision in that case (*Range Co. v. Carver*) proceeded upon a misconception of the true principle which governs in such cases, and especially did the Court fail to advert to the distinction between the class of cases cited in the opinion and the class to which this case belongs. In the cases of the former class, the Court dealt with the power to tax imported goods as property, or with the right to tax generally when the goods have been once sold or the packages broken and they have been mingled with the mass of property in the State, or with the right of the State to exercise its police power in the particular case, while our case comes within the principle settled by the Court

in *Brown v. Maryland, supra; Robbins v. Taxing District, supra; Brennan v. Titusville, supra*, and other cases involving the same question as we have in this case.

We cannot better close this part of the discussion than by referring to the recent case of *Steel and Wire Co. v. Speed*, 192 U. S., 500, in which *Justice White*, for the Court, delivers an exceedingly able and well-considered opinion, where the principles relating to the right of the States to tax as affected by the commerce clause of the Constitution are stated with great force and clearness, and the case will be found, we think, to sustain the views we have herein expressed.

In the case of *Comrs. v. Harmel,* 166 Pa., 89, 27 L. R. A., 388, the Court draws sharply the distinction between the right of the State, in the exercise of its police power, to tax a peddler or person who delivers the very article he offers for sale at the time he sells it, and a case like ours, and, in reference to a transaction such as the one described in this record, it says: "It must be conceded that these clocks may be sent into this State in manufacturer's packages, and they may be sold in the same packages under the authority of the interstate commerce clause; but once in this State and the package opened by the consignee the disposition of the separate articles at retail is intrastate traffic, and subject to the police regulations that experience may show to be necessary for the protection of citizens in the comfort of their homes and the enjoyment of their property." This is our case exactly. Though it may make no difference in this case, in the view we take of it, whether the license tax was required of the plaintiff for the purpose of revenue, or was imposed merely in the exercise of the police power of the State, it may be well to state that an examination of the Revenue Act will show clearly that the tax was laid as a measure for the collection of revenue. It is placed in the same category, under section

B, with license taxes upon lawyers, physicians, dentists, real estate agents, collectors of rent and others of similar occupations, who are certainly not taxed, in the exercise of the police power, as the proper subjects of police surveillance like "hawkers, peddlers and petty chapmen." This is not a tax levied in the execution of any inspection law or for the purpose of enforcing any mere police regulation, but, by the express terms of the act, for the purpose of raising the necessary revenue to support the government.

If it is urged that no discrimination is made between those who sell imported and those who sell domestic goods it will not meet the difficulty, as said in *Robbins v. Taxing District*. The law requires of course that there shall be entire commercial equality and this precludes discrimination, but it also provides that interstate commerce cannot be taxed at all, as any tax which is imposed upon it is, in a constitutional sense, a regulation of it and void for that reason, and especially so when it restrains the importer or fetters the right of importation at any stage of this commercial intercourse. In order to fix the period when interstate commerce terminates, it has been said by the highest authority upon the subject that the criterion announced in *Brown v. Maryland*, namely, a sale in the original packages at the point of destination, is applicable and is selected as the one by which to test the validity of the power exerted in the particular case, whether by way of direct prohibition of the introduction of the goods or of their sale after they have arrived in the State, or by way of taxation, not on the goods themselves as property, but on the importer's right to sell them, which we have seen is a part of his right to import. As such taxation necessarily operates as a restriction of his right to import, it is, to that extent, as objectionable as if the sale of the goods had been actually prohibited. *Steel and Wire Co. v. Speed*, 192 U. S., 500.

We think that *Leisy v. Hardin,* 135 U. S., 100, is exactly like our case in principle. In that case it is said: "They had the right to import the beer into the State, and, in the view which we have expressed, they had the right to sell it, by which act alone it would become commingled with the common mass of property in the State. Up to that point of time we hold that, in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or *non-resident* importer." [Italics ours.] Commenting on that case in *Rhodes v. Iowa,* 170 U. S., at pages 416-417, the Court, by *Mr. Justice White,* says: "Subsequently, in *Leisy v. Hardin,* the question which was thus reserved in the Bowman case arose for adjudication, and it was held that the right to sell the imported merchandise in the original package, free from interference of State laws, was protected by the Constitution of the United States, as up to such sale the goods brought into the State were not commingled with the mass of property in the State." In order to see the full force of these citations, and to furnish what we think is direct authority for our decision in this case, we need only add that the question referred to as having been reserved in *Bowman v. Ry. Co.,* 125 U. S., 465, was thus stated in *Rhodes v. Iowa, supra:* "The Court in the course of its opinion adverted to the question whether goods so shipped (from one State to another) continued to be protected by the interstate commerce clause after their delivery to the consignee and up to and including their sale in the original package by the one to whom they had been delivered, but did not decide the question, as it was not essential to do so. Referring to the subject, however, the Court said: 'It might be very convenient and useful in the execution of the policy of prohibition within the State to extend the powers of the State beyond its territorial limits. But such extra ter-

ritorial powers cannot be assumed upon such an implication. On the contrary, the nature of the case contradicts their existence; for if they belong to one State they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the Constitution by its delegations of national power to prevent. It is easier to think that the right of importation from abroad, and of transportation from one State to another, includes, by necessary implication, the right of the importer to sell unbroken packages at the place where the transit terminates; for the very purpose and motive of that branch of commerce which consists in transportation is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported. Such, indeed, was the point decided in the case of *Brown v. Maryland,* 12 Wheat., 419, as to foreign commerce, with the express statement in the opinion of *Chief Justice Marshall* that the conclusion would be the same in a case of commerce among the States.' " As decided in *Brown v. Maryland,* sales by the importer of goods brought into the State from another State, and still in the original packages, are exempted from interference of the State by taxation, because the tax, if it were held to be valid, would intercept the import, as an import, in the way to become incorporated with the general mass of property in the State, and would deny it the privilege of becoming so incorporated until it should have contributed to the revenue of the State. This is the crucial principle, and the statement of it in *Brown v. Maryland* "contains in a nut-shell the whole doctrine upon the subject of original packages." A tax on the right to sell imported goods amounts *pro tanto* to a prohibition of the sale, because it indirectly forbids that to be done which constitutes the most valuable part of the right

to import, and "intercepts the import in the way to become incorporated with the property in the State."

In *Austin v. Tenn.,* 179 U. S., 343, we find a terse and clear statement of the effect of the decision in *Leisy v. Hardin,* as follows: "It was held (in that case) that (the goods) being articles of lawful commerce, the State could not, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State; or, when imported, prohibit their sale by the importer, and that they did not become a part of the common mass of property within the State so long as they remained in the casks in which they were imported and continued to be the property of the importer." The same view is taken in the case of *Schollenberger v. Pennsylvania,* 171 U. S., 1, which involved the power of a State to forbid the introduction and the sale in original packages of oleomargarine.

In *Leisy v. Hardin,* 135 U. S., 100, the statute of Iowa prohibited the sale of intoxicating liquors brought into that State, and a sale having been made in violation of the statute, it was held that as to sales by the importer and in the original packages or kegs, unbroken or unopened, of liquors manufactured in and brought from another State, the statute was unconstitutional and void. It will be observed that the prohibition was directed not against the introduction of the goods into the State, as in *Bowman v. Railroad Co.,* but it had reference solely to their sale after they had arrived in the State. If, as we have shown, a sale after the arrival of the goods in the State cannot be prohibited, it is certain that it cannot be restricted by the imposition of a license tax. State prohibitions and State restrictions are equally unauthorized and invalid. As the Court said in *Austin v. Tennessee,* 179 U. S., 350, on the authority of *Brown v. Maryland,* there is "No difference between a power to prohibit the sale of an article while it was an import and the

power to prohibit its introduction into the country. The one would be the necessary consequence of the other. No goods would be imported if none could be sold."

It has been assumed in this case that the clause in section 44 of the Revenue Act defining a peddler applies to the occupations named in section 36, because this Court, in *Range Co. v. Carver,* held that it did, though we entertain some doubt as to whether that clause does not apply exclusively to persons named in section 44, and, if the question was presented for the first time, we would perhaps so decide. The context of that section, and the provisos immediately annexed to the clause defining a peddler, indicate that to have been the intention. But we have accepted the construction placed upon that clause of section 44 in *Range Co. v. Carver,* at least for the purpose of this decision, as the correct one.

We have treated the question involved in this case at some length, as it is of great importance to the State that the limit of her power to tax should be definitely known. We are disposed of course to sustain the validity of an act of the Legislature and will indulge every presumption in its favor. It must be clearly incompatible with constitutional provisions before we will pronounce it invalid, but when we conclude that the Legislature has exceeded its power in the particular instance it becomes our plain duty to so declare. As said in *Robbins v. Taxing District,* the State will in the end derive just as much revenue from the goods as if they had had their origin in the State. If the provision of the Constitution regulating commerce is permitted to have its free and full operation, the goods when they come into the State will, by the sale of them, whether before or after their introduction, become incorporated with the property of the State and will then be the subjects of taxation. 120 U. S., at page 497.

In any view we have been able to take of this case, after the most careful consideration and examination of the facts and the authorities, we are of the opinion that the tax is illegal and that the judgment of the Court below upon the case agreed should have been for the plaintiff.

Reversed.

BECK v. MERONEY.

(Filed May 24, 1904).

1. TAXATION—*Quieting Title—Cloud on Title—Tax Titles—Acts 1893, ch. 6—Pleadings.*

In an action to set aside a tax deed as a cloud on title, it was not necessary that the complaint allege that all the taxes had been paid, provided evidence of that fact was introduced at the trial.

2. CLOUD ON TITLE—*Tax Titles—Quieting Title.*

Where the taxes, interest and costs for which land was sold were paid by the tax debtor during the year allowed for redemption, the tax deed, valid on its face, constituted a cloud on the title.

3. TAX TITLES—*Payments.*

Where a tax debtor paid the amount demanded by the sheriff to redeem the land from tax sale, such payment constituted a redemption, though the sheriff erroneously computed the amount due.

4. TAX TITLES—*Payments.*

Where the owner of land pays the sheriff the taxes, costs and interest on land sold for taxes, and the sheriff tenders the money to the purchaser, it is sufficient, though the payment was made to the sheriff by check.

5. TAX TITLES—*Limitations of Actions—Acts 1893, ch. 6.*

An action to set aside a tax deed as a cloud on title is not barred within three years from the sale.

BECK *v.* MERONEY.

ACTION by L. H. Beck against B. B. Meroney and others, heard by *Judge W. A. Hoke* and a jury, at November Term, 1903, of the Superior Court of CHEROKEE County. From a judgment for the plaintiff the defendant appealed.

E. B. Norvell and *Ben Posey,* for the plaintiff.

Dillard & Bell, F. P. Axley and *R. L. Cooper,* for the defendant.

MONTGOMERY, J. The defendants in 1898 bought the mineral interests in the land described in the complaint at a sheriff's sale for taxes, and more than a year thereafter received the deed from the tax collector to the property. In the meantime, and within six months after the sale for taxes, the plaintiff paid through his agent, Southerland, to the sheriff of the county the amount estimated to be due by the sheriff for taxes, costs and interest. The defendants in the Court below moved *ore tenus* to dismiss the complaint because it was not alleged therein that all the taxes due on the land had been paid, and that it was alleged in the complaint that the defendants' deed was absolutely void and tended to cast a cloud upon the plaintiff's title. The motion was properly denied.

We think it was not necessary that it should have been alleged in the complaint that the taxes had been paid on the land. The Revenue Act, under which the land was sold, did not require that. In *Moore v. Byrd,* 118 N. C., 688, it will be seen that the Court construed the statute to mean that the tax debtor must show by the *evidence* that he had title to the property at the time of the sale, and that all taxes had been paid upon the property, and the plaintiff introduced such evidence. The complaint not only contained the allegation that the tax deed held by the defendants was absolutely void (and so it was if the land had been redeemed by the

tax debtor), but it also contained the allegation that the deed on its face was apparently regular and valid. If the taxes, therefore, and the costs and interest had been paid by the plaintiff tax debtor within the year allowed for redemption, then the deed, being valid on its face, constituted a cloud on the plaintiff's title.

When land is sold for taxes in this State the purchaser, during the time allowed for redemption, has a statutory lien upon the land for the taxes, costs and interest; but when the taxes and charges are paid within the year allowed for redemption the lien is discharged by the payment. The agent of the plaintiff approached the defendants for the purpose of redeeming the land, and upon their refusal to receive payment he paid the amount to the sheriff of the county, who himself made out the amount estimated to be due. Because the sheriff made a mistake in the calculation of about fifty cents, the defendants insist that redemption did not follow the payment of the amount due by the sheriff's calculation. There can be nothing in that contention in reason, justice or law. A tax payer in this State has the right to rely, in redeeming his land from sale for taxes, upon the statement of the tax collector, the officer of the State for the collection of its revenue.

The defendants contend further, that because the Revenue Law required that the sheriff should collect taxes *in money*, therefore, because he received a check on a bank from the tax debtor's agent, there was no redemption. But it appears in the evidence that the sheriff collected and used, as sheriff, the check, and tendered to the defendants not the check but money in payment of the amount due by the tax debtor, and that they refused to receive it.

The defendant pleaded the three years' statute of limitations as a defense to the action. The Revenue Law in force at the time the land was sold for taxes provided that "no

action for the recovery of real property sold for non-payment of taxes shall lie unless the same be brought within three years after the sheriff's deed is made as above provided." It is true that more than three years had elapsed between the execution of the sheriff's deed and the time of the commencement of this action, but this is not an action for the recovery of the land; it is simply an action to remove a cloud from the plaintiff's title under the Act of 1893, chapter 6.

No Error.

CURRIE v. RAILROAD CO.

(Filed May 24, 1904).

1. PENALTIES—*Statutes—The Code, sec. 1964—Acts 1903, ch. 444—Interstate Commerce—Pleadings—Carriers.*

In an action for a penalty, the statute allowing the same being a public one need not be pleaded.

2. CARRIERS—*Penalties—Pleadings—Tender.*

In an action for a penalty, the complaint alleging the tender on a specified day, and that the defendant on the two following days "failed and refused to receive the same," is a sufficient allegation of tender for the last two days.

3. INTERSTATE COMMERCE—*Penalties—Carriers.*

Where a car of lumber tendered to a railroad company for transportation was found to have been properly loaded, the carrier was liable for the penalty for refusal to receive the same for transportation, notwithstanding the car was to be shipped out of the state.

ACTION by J. L. Currie and others against the Raleigh and Augusta Air Line Railroad Company, heard by *Judge C. M. Cooke* and a jury, at September Term, 1903, of the Superior Court of MOORE County. From a judgment for the plaintiff the defendant appealed.

J. D. McIver and *H. F. Seawell,* for the plaintiff.
John D. Shaw, for the defendant.

CLARK, C. J. This is an action for the penalty (fifty dollars per day) incurred under The Code, section 1964, as amended by chapter 444, Laws 1903, for refusal by the defendant to receive for transportation a car-load of lumber, tendered May 7, 1903, and which remained unshipped the two succeeding days, May 8th and 9th.

The defendant moved to dismiss because the complaint did not state a cause of action. This is predicated, we understand, upon the ground that the statute giving the penalty was not pleaded, and that a renewal of the tender on the 8th and again on the 9th of May was not specifically alleged. Being a public statute, it was not requisite to plead it. It is enough to set out the facts. *Comrs. v. Comrs.,* 101 N. C., 520. The complaint alleged a tender, at the defendant's regular depot at Cameron, N. C., on May 7, 1903, and that "the defendant for two successive days, to-wit, on 8th and 9th of May, 1903, failed and refused to receive the same." The answer admits this averment to be true, and avers that the defendant refused to receive said car-load of lumber for transportation because that, when tendered, it was not in proper condition for transportation, but was loaded contrary to the rules of the defendant company, of which the plaintiff had notice, and as loaded was at the time of said tender in unsafe and dangerous condition, and in such condition as to insure its rejection by connecting lines when tendered. There was sufficient averment of tender, and if any defect therein it was cured by the answer. The penalty is "Fifty dollars for each day said company refuses to receive said shipment," which refusal is admitted in the answer. There was conflicting evidence as to whether the car of lumber was "properly loaded and

safely secured for its transportation," which issue was found by the jury in favor of the plaintiff.

The only point in the defendant's brief necessary to be considered is the refusal to instruct the jury that, upon all the evidence, the plaintiff is not entitled to recover. This is placed upon the ground that the car being tendered for transportation to Pittsburg, Pa., "the imposition by the State of a penalty for refusing to receive the car because not loaded in such a manner as to be received by connecting carriers, was an interference with interstate commerce." There was an issue tendered by the defendant to that effect, and the jury found upon the issues submitted that the car "was properly loaded and safely secured for its transportation to Pittsburg, Pa." That in such case the State can impose a penalty for refusal to receive, or delay in beginning the shipment, is fully discussed and decided in *Bagg v. Railroad*, 109 N. C., 279, 26 Am. St. Rep., 569, 14 L. R. A., 596, and the defendant offers us no good reason and no precedent to the contrary.

There were other exceptions taken, but they are without merit or are not set up in the defendant's brief. *State v. Register*, 133 N. C., 746.

No Error.

DAVIS v. FREMONT.

(Filed May 24, 1904).

MUNICIPAL CORPORATIONS—*Bonds.*

The providing of a system for lighting the streets of a town is a necessary expense, for which bonds may be issued without submitting the proposition to a vote of the people.

DOUGLAS, J., dissenting.

ACTION by J. D. Davis against the town of Fremont, heard by *Judge W. R. Allen,* at May Term, 1904, of the Superior Court of WAYNE County. From a judgment for the defendant the plaintiff appealed.

M. T. Dickson, for the plaintiff.
F. A. Daniels, for the defendant.

CONNOR, J. The commissioners of the town of Fremont, in Wayne County, on May 13, 1904, adopted a resolution reciting that experience had demonstrated the necessity for providing a system of lighting the streets of the town, and that all experiments theretofore made to do so had proved unsuccessful; that after investigation the board had ascertained that an electric light plant can be erected of sufficient capacity to furnish light for the town and its inhabitants at a cost of $4,000. They proceed to declare that the establishment of an electric light plant for the town is a public necessity, and that it is necessary to contract a debt of $4,000 for such purpose. It is thereupon resolved to issue bonds in said amount of $4,000, each carrying interest at 6 per cent. and maturing January 1, 1919. Provision is made for a sale of the bonds at not less than par, and that the proceeds of such sale shall not be used for any other purpose than the purchase and

establishment of said plant. Provision is also made for levying a tax for the payment of the interest on the bonds, and a sinking fund to pay the principal at maturity.

It appears from the pleadings that the town of Fremont was duly incorporated with all the powers conferred upon cities and towns by chapter 62 of The Code. The town had a population of eight hundred, and the assessed value of the real and personal property is $222,000. Its present rate of taxation is forty-five cents on the one hundred dollars worth of property and $1.35 on each poll. Its chartered limit is 66 2-3 cents and $2 on each poll.

The plaintiff, a tax payer in the town, seeks to enjoin the commissioners from issuing the bonds for that the proposition has not been submitted to a vote of the people of the town. The cause was heard by his Honor *Judge Allen* upon a motion for an injunction, who found the facts above set forth, and the additional fact that there was no limitation in the charter of the town of Fremont upon the power to contract for necessary expenses, and the further fact that the town can pay the interest on said debt and provide a sinking fund to pay the principal without exceeding the limit of taxation in its charter, and being of opinion that the establishment of the electric light plant is a necessary expense, refused to grant the injunction. Plaintiff appealed.

We are of the opinion that the facts set forth in the order of his Honor bring the case clearly within the ruling of this Court in *Fawcett v. Mt. Airy*, 134 N. C., 125. That case was decided after careful consideration, and with the limitation of the general principle found in *Wadsworth v. Concord*, 133 N. C., 587, and *Robinson v. Goldsboro*, at this term, we are content to abide by the law as therein laid down. We think the decision sound in reason and consistent with the conditions existing in this State. The power thus recognized should be carefully exercised. The duty rests upon the peo-

ple in the town to intrust it only to men of good judgment and incorruptible integrity, who recognize their responsibility to the people. If injury comes to the people, they are alone responsible for it. We see nothing in the record to cause us to doubt the power being wisely exercised. The judgment below is

Affirmed.

DOUGLAS, J., dissents.

SITTON v. LUMBER CO.

(Filed May 24, 1904).

WITNESSES—*Costs—Trial—The Code, sec. 1370.*

Though a witness can prove his attendance against the party who subpœnas him, such attendance cannot be taxed as costs against the opposite party in case he loses, unless the witness was examined at the trial or was tendered to such opposite party.

ACTION by M. L. Sitton against the Edward-Eversole Lumber Company, heard by *Judge E. B. Jones,* at March Term, 1904, of the Superior Court of SWAIN County. From a judgment for the plaintiff the defendant appealed.

Bryson & Black, for the plaintiff.
A. M. Fry, for the defendant.

CLARK, C. J. A witness can always prove his attendance against the party who subpœnas him, but his attendance can only be taxed against the opposite party (if it loses the verdict) when he has been examined as a witness on the trial or was tendered to such opposite party on the trial, and even

then not more than two such witnesses can be taxed to prove any single fact. The Code, section 1370; *Cureton v. Garrison,* 111 N. C., 271; *State v. Massey* 104 N. C., at page 881. In *Henderson v. Williams,* 120 N. C., 339, where the defendant's witnesses were present when the case was called for trial for a nonsuit, the costs of such witnesses, not to exceed of course two to prove any single fact (The Code, section 1370), were taxed against the plaintiff because the defendant "had no opportunity to swear, examine or tender his witnesses by reason of the nonsuit." It has always been the recognized practice that, inasmuch as only two witnesses of the successful party to prove any single fact can be taxed against the losing party, the purport of the evidence of the witnesses so sought to be taxed shall be demonstrated by examination on the trial, or at least that the losing party may have an opportunity to ascertain the materiality of the evidence of such witnesses, and prevent being taxed with an excessive number upon any single point by such witnesses being sworn and tendered to the opposite party for examination. *Porter v. Durham,* 79 N. C., 596. It is true that in *Loftis v. Baxter,* 66 N. C., 340, it is said that the witnesses must be "sworn or tendered," but this is an inadvertent expression for "sworn and examined or tendered," *i. e.,* witnesses subpœnaed by the successful party cannot be taxed against the losing party unless sworn and examined by the successful party, or sworn and tendered to the losing party to be examined, that their materiality may be shown. Otherwise a successful party may oppress the losing party by subpœnaing and swearing any number of witnesses and having their attendance taxed, while examining only the few necessary to gain the action. Merely swearing the witnesses would be no assurance of their materiality. They must be examined or tendered to the opposite party to be examined, should he so choose, and if examined by the opposite party

they are to be examined as the witnesses of the party summoning such witnesses, and under the rules of cross-examination pertaining to the examination of an adversary's witnesses.

In *Cureton v. Garrison, supra,* the Court held "no error" upon the following ruling of the Judge (*Hoke*) below: "If the witnesses were not sworn and examined or tendered, even though attending under subpœna, and though they would have given material evidence, their fees cannot be taxed against the losing party."

The judgment below taxing against the losing party witnesses of the other side, who were neither examined nor tendered on the trial, is

Reversed.

CRITCHER v. PORTER CO.

(Filed May 24, 1904).

1. SALES—*Damages—Measure of—Warranty—Contracts.*

In the absence of special circumstances, the measure of damages for breach of warranty as to the quality or capacity of machinery sold is the difference between the contract price and the actual value, with special damages which were in contemplation of the parties.

2. SALES—*Warranty—Damages—Measure of—Contracts.*

Where machinery fails to come up to the warranty thereof, the buyer may refuse to keep it, and recover for the amount paid thereon, together with such damages as he sustained and which were in contemplation of the parties.

3. SALES—*Warranty—Damages—Measure of—Contracts.*

In an action for breach of warranty as to saw-mill machinery the purchaser cannot recover for loss of profits on lumber contracted to be sold, if the contract was not known to the seller.

CRITCHER *v.* PORTER CO.

4. DAMAGES—*Warranty—Contracts—Sales.*

In an action for breach of warranty on the sale of an engine for use in a saw-mill, under a warranty that it will develop a certain horse-power, or that defendant will make it do so, the plaintiff is entitled to recover expenses incurred in running the mill at the request of the defendant.

5. DAMAGES—*Warranty—Contracts—Sales.*

In an action for breach of warranty on the sale of an engine for use in a saw-mill plaintiff is entitled to interest on the amount invested in the mill for the time it was idle.

ACTION by Roger Critcher against the Porter-McNeal Company and others, heard by *Judge G. S. Ferguson* and a jury, at September Term, 1903, of the Superior Court of MARTIN County.

The plaintiff alleged that he contracted with the defendants for the purchase of an Erie City 25 horse-power, 10x12 horizontal center-crank engine, together with other machinery for the equipment and operation of a saw-mill, at the agreed price of $1,150, to be paid partly in cash and the balance in several installments, for which he was to execute his promissory notes secured by a deed in trust. The deed sent to the plaintiff for execution described the engine as "one 25 H. P., 9x12 horizontal center-crank engine." Plaintiff wrote defendants, calling attention to the fact that the engine was described in the deed as 9x12, while he had contracted for one 10x12, and for that reason declined to execute the notes and deed. That defendants in reply wrote that they would guarantee that the engine described, and which they would send, "would develop 25 horse-power and be plenty large to operate plaintiff's mill." That plaintiff, relying on said guaranty, before the engine arrived signed the deed in trust and notes and sent them to defendants with the cash payment of $400. That after the engine was put up it was found that it would not cut the logs, wanting power to do so.

The plaintiff complained to defendants and they urged him to continue to use the engine and the trouble would disappear. That defendants urged that the oil used by plaintiff was not of good quality. That after giving defendants full opportunity to make good their guaranty, they having failed to do so for nine months, plaintiff put the engine aside and notified defendants that it was held subject to their order. Defendants thereupon advertised the property conveyed in the trust deed for sale. This action is brought for the purpose of enjoining the sale of the property and to recover damages by way of recoupment, etc. The sale was enjoined. The defendants denied the material averments in the complaint. The Court, without objection, submitted the following issues:

1. "Did the defendants guarantee that the engine sold to plaintiff would develop 25 horse-power?" To which the jury answered "Yes."

2. "Would the engine sold to plaintiff develop 25 horse-power?" To which the jury answered "No." The plaintiff's damages were fixed at $98. The balance found due the defendants on the note was fixed at $411, with interest, and subject to the $98 damage.

The plaintiff testified in regard to the contract and guaranty. He further testified that he signed the trust deed upon the faith of the guaranty. The engine was received about the 8th day of May, and was put up by experienced machine men. From the beginning plaintiff saw that it would not cut; found the trouble to be that it lacked power. It got worse all the time and he continued to complain to the defendants. They sent a man out to examine it. He did not remedy it. Plaintiff, at the instance of defendants, sent engine to them at Norfolk. Was gone a week or ten days. Shortly after its return Mr. Hardy came again to overlook it. He did nothing to it. Plaintiff asked him how he could tell whether it would develop 25 horse-power. He said if it

didn't cut a blind line with eighty pounds of pressure on fast speed, it would not develop 25 horse-power. Plaintiff urged him to test it, but he declined. He said that plaintiff was not using proper oil; gave him order for twenty-five gallons such as he recommended. The engine did no better with new oil. Plaintiff wrote to defendants frequently that they must do something to remedy the trouble. They continued to assure the plaintiff that it would improve and they would remedy it. Plaintiff finally wrote defendants that unless something was done at once to remedy the trouble he would be obliged to put it aside and purchase another, which plaintiff finally did. Was trying to use it nine or ten months, relying upon the assurance of defendants that it would get all right or they would remedy it. It was idle two-thirds of the time. It would never develop 25 horse-power. Plaintiff testified: "I had been operating a mill previous to the time I made the contract with the defendants. Had between $1,200 and $1,500 invested in mill and other fixtures, and $1,500 to $2,000 additional in logs and teams. Had five men engaged by the year in the service of the mill (giving amount of wages paid, etc.). They were idle part of the time. In addition I had drivers, loggers and some men cutting logs in connection with the mill. The teams were idle when the mill was not running. I had commenced to cut logs for the mill before I contracted with the defendants. Had a quantity of logs on hand. I lost on account of the idleness of the mill."

The plaintiff proposed to prove that, at the time of his contract with defendants, plaintiff had contracted with reliable parties for the sale of the output of his mill at a stipulated price, and that plaintiff was unable to comply with said contract on account of the failure of the defendants to furnish the engine contracted for. This evidence was offered upon the question of damages, and, upon objection, was excluded.

Plaintiff excepted. The plaintiff further testified that the engine which he got was afterwards priced by defendant Porter at $168. That a fair output of a 25 horse-power engine was 6,000 to 8,000 feet a day. The engine furnished did not average over 1,500 feet a day. That the usual profits during the time the engine was in use was $1.50 per thousand feet clear of expenses. He had a quantity of logs. On account of idleness of mill between 12,000 and 20,000 feet were not hauled from the woods.

His Honor instructed the jury in regard to the measure of damages as follows: "If you should find that the engine in question would not develop 25 horse-power, then the measure of the damages which the plaintiff is entitled to recover is the difference between the price paid or agreed to be paid for the engine and the real or true value of the engine in fact sold and delivered to the plaintiff. There is no fixed price stipulated for the engine in the written contract between the parties. So you will inquire and ascertain from the evidence what was the price charged for the engine furnished the plaintiff, and subtract the real value of the engine furnished at the time it was received from the price charged, and the remainder is the measure of the plaintiff's damage in this case, if you should find the second issue in his favor." Plaintiff asked certain instructions, which were refused, and to such refusal plaintiff excepted, and from a judgment from the verdict appealed.

Gilliam & Martin, for the plaintiff.
Harry W. Stubbs and *H. S. Ward,* for the defendants.

CONNOR, J., after stating the facts. The only question presented by the plaintiff's exceptions relates to the kind and measure of damages to which he is entitled upon the evidence and finding of the jury. It is well settled by all of the text-

books and adjudged cases that, in the absence of any special conditions or special damage, the true measure of damages for breach of warranty as to the quality or capacity of machinery sold is the difference between the contract price and the actual value. *Kester v. Miller,* 119 N. C., 475; *Mfg. Co v. Gray,* 126 N. C., 108. There are cases, however, to be found in our Court and the courts of other States in which, by reason of special and peculiar circumstances other elements of loss enter and may be recovered as damages. If the plaintiff had, immediately upon the receipt of the engine, ascertained that it did not develop 25 horse-power as warranted to do, rejected it, or, as he expresses it, "put it aside," notifying the defendant thereof, it is clear that he would have been entitled to recover the amount paid and to a cancellation of his notes and the trust deed, together with such damage as he sustained and which were within the contemplation of the parties in his effort to use it. If he had retained and used it, his measure of damage would have been the difference between the contract price and the actual value of the engine, with such special damages as were within the contemplation of the parties. Joyce on Damages, section 1716.

The question before us is, however, complicated by the fact that a contract collateral to the principal one was made by the parties. The plaintiff knew that the engine which he accepted, and for which he paid in cash and notes, was not the same which he contracted for. He accepted it with a contract of guaranty that it would develop 25 horse-power, or that the defendant would make it do so. This contract was not performed on the part of the defendant, and for which breach of contract he claims damages. It was not contemplated that the engine should be returned until the defendants were given a reasonable time within which to make it develop 25 horse-power. Therefore the rule usually applicable to breaches of warranty in the sale of machinery does not

apply. We are of opinion that after a reasonable opportunity given the defendants to make good the guaranty the plaintiff had the right to reject the engine. If he had paid for it he could have sued for damages, and it would seem that the measure of his recovery would be the amount paid and such incidental or special damage as was within the contemplation of the parties, and as he had sustained, subject to be reduced by a fair rent of the engine while using it. If instead of rejecting it he retained the engine, he would recover the difference between the contract price and its real value, with special damages, subject to the same deduction.

The courts find difficulty in defining and fixing the limits to what are termed special damages. All authors and Judges concur that the rule or principle to be followed is that laid down in the leading case of *Hadley v. Baxendale:* "When two parties make a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to defendant, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in a great multi-

tude of cases not affected by any special circumstances for such breach of contract; for, had the special circumstances been known the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would have been very unjust to have deprived them."

The Judges concur in the principle, but find great difficulty in applying the rule to the ever-varying cases which are presented for adjudication. Simple contracts of purchase with warranty as to soundness or quality are of easy solution. But when, by varying the orginal contract, either attaching new agreements or conditions, or making contracts collateral to the original, thus introducing difficult and complicated elements, the courts find it extremely difficult to apply general principles working out satisfactory results. *Beasley, C. J.*, in *Crater v. Binninger*, 33 N. J., 513, 97 Am. Dec., 737, referring to the rule laid down in *Hadley v. Baxendale, supra*. says: "This is the usual statement of the rule, but the difficulty has been to apply this general proposition to this particular case; for, in any attempt to examine causes in connection with their effects, it will be soon apparent that some criterion is necessary by which to decide what result is proximate and what remote, in a legal sense, to the given act. The standard set up by the decisions above cited supplies to a reasonable degree this deficiency. The test is that those results are proximate which the wrong-doer from his position must have contemplated as the probable consequences of his fraud or breach of contract." *Mace v. Ramsey*, 74 N. C., 11.

The testimony discloses a contract for the sale of an engine of a certain make, size and capacity. It would seem a reasonable inference that the seller knew that it was to be used to run a saw-mill for cutting logs into boards. His guaranty must, in the light of these facts, be construed as an assurance that although the engine was 9x12 instead of 10x12, as

contracted for, it would develop for this particular use the same power as the engine contracted for, or that they would make it do so. This of course involved the idea that the plaintiff was to put it in position for use and use it, giving the defendants a reasonable time and opportunity to fulfill their contract.

What damage would usually result from a breach of this contract? What would a man selling such machinery, knowing the use to which it was to be put, the place to which it was to be sent, etc., have reasonably contemplated as the result of a failure to make this develop 25 horse-power? The plaintiff offered to show, at the time of making the contract, he had contracted with reliable parties for the sale of the output of his mill at a stipulated price. The refusal to permit him to show this is the basis of his first exception. It is well settled that, while for breach of contract the law seeks to give full compensation for actual loss sustained, it will not undertake to estimate uncertain profits. We think that in the absence of any knowledge on the part of the defendants that the plaintiff had made such a contract, damages resulting from it could not be said to be within their contemplation. There is the further objection that the plaintiff did not offer to show that he had logs on hand sufficient to run the mill any given number of days, or for what time the contract extended. If the question as stated in the record had been answered, the jury could not possibly have made it the basis for assessing damages. There were too many elements of uncertainty involved to form the basis of any verdict. It may be that the plaintiff intended to show how these matters were, but we must pass upon the exception as presented to us in the record.

In *Lewis v. Rountree*, 79 N. C., 123, 28 Am. Rep., 309, the plaintiff was permitted to recover upon the basis of the price of the rosin in New York, to which point it was

shipped, for the reason that it was purchased for that purpose and the defendant had notice of it. In *Mace v. Ramsey, supra*, the boat was hired for a particular occasion and the plaintiff had engaged a certain number of passengers at an agreed price. The Court held that such loss as ensued was within the contemplation of the parties. In *Mfg. Co. v. Rogers*, 19 Ga., 416, it was held that damages could not be recovered for failing to ship machinery for a cotton mill based upon anticipated profits from the output of the mill, *Lumpkin, J.*, saying: "The gains were too remote and uncertain, depending upon a variety of contingencies, the failure of any one of which would subvert the whole computation."

The slightest reflection will show the number of contingencies attending a sale of the output of a saw-mill—the weather, a breakdown of the mill, failure to get logs, etc. *Sycamore Co. v. Strum*, 13 Neb., 210. His Honor properly excluded the testimony.

The plaintiff excepts to the refusal of the Court to give certain special instructions, first, that the plaintiff is entitled to recover reasonable rent and insurance for the buildings, which were idle by reason of the delay of the defendants to furnish an engine according to contract. We find no evidence upon which to base this instruction. The plaintiff says nothing of any buildings being idle or of any insurance paid. The same is true in regard to the second prayer. There is no evidence that the logs were damaged, or, if so, to what amount.

The third prayer is based upon the principle announced in *Kester v. Miller, supra*. The plaintiff was entitled to this instruction. For the reasons given in that case, the plaintiff is entitled to such damages as he sustained while operating the mill at the defendant's request to enable them to make the engine develop 25 horse-power. The defendants knew that the mill was being operated at their request and

for their benefit. They knew that it required hands, teams, etc., to operate the mill, and any loss sustained in doing so must have been within the contemplation of the parties. It is true the evidence on this question is very meager, and if there was no more than we find in the record the jury would have found difficulty in assessing the plaintiff's damages. There was, however, some evidence of the number of hands engaged about the mill, the price paid them, and the difference per day in the output of the mill as it was and should have been according to the contract, and the value thereof. This exception must be sustained. *Mfg. Co. v. Rogers, supra.* This ruling does not include hands and teams employed in logging. It includes only those employed in running the mill.

The fourth prayer is disposed of by the ruling upon the rejection of the proposed evidence. The same ruling applies to the fifth prayer. The sixth is included in the disposition of the third prayer. The seventh prayer is disposed of by what is said in regard to the fourth. There is no evidence that the defendant knew of the employment of teams, etc., for logging the mill. The eighth prayer, in so far as it applies to the amount invested in the milling outfit, should have been given. For any time that the milling machinery was idle the plaintiff is entitled to interest on the amount invested. *Boyle v. Reeder*, 23 N. C., 607; *Rocky Mt. Mills v. Railroad*, 119 N. C., 693, 65 Am. St. Rep., 682.

There is no evidence to sustain the ninth prayer, and the same is true as to the tenth.

We have carefully examined the entire record. For the reasons pointed out, there must be a new trial on the third issue as to damages.

The plaintiff will recover the costs in this Court.

New Trial.

JONES v. WATER CO.

(Filed May 24, 1904).

1. MUNICIPAL CORPORATIONS — *Parties—Contracts—Water Companies.*

Where a water company contracts with a town to furnish water at a certain pressure for the purpose of extinguishing fires, a citizen injured by a failure of the company to furnish the water as contracted may recover in his own name for the injury.

2. MUNICIPAL CORPORATIONS—*Contracts—Water Companies.*

Under a contract with a water company to supply water for extinguishing fires, requiring that it shall provide pressure on four minutes' notice to throw ten streams at a certain height, a property owner, suing for damages for failure to furnish water for the extinguishment of a fire, need not show that notice was given the company, as such provision was for an extraordinary pressure to show the capacity of the plant.

ACTION by R. M. Jones against the Durham Water Company and others, heard by *Judge C. M. Cooke* and a jury, at January Term, 1904, of the Superior Court of DURHAM County. From a judgment for the defendants, the plaintiff appealed.

Boone & Reade and *Manning & Foushee*, for the plaintiff.
Winston & Bryant and *Fuller & Fuller*, for the defendants.

CLARK, C. J. The defendant contracted with the town of Durham to put in a water plant (section 2) "to abundantly supply said town of Durham and its inhabitants with pure and wholesome water fit for all domestic purposes * * *" (section 3), and will furnish at said hydrants at all points all water necessary for all fire extinguishing and other pub-

lic purposes." (Section 5). "An adequate supply of water for the sprinkling with carts of all paved streets * * * and for the extinguishment of fires." (Section 6). "That if at any time it shall fail to furnish an adequate supply for all fire and other public purposes, as herein stipulated," etc. There was evidence tending to show that the house of the plaintiff in said town was burned down because of an almost total lack of pressure; that the stream of water did not reach more than half-way to the eaves of the house, twenty feet being the greatest height to which the water was thrown.

There can be no real contention that the plaintiff, a citizen and tax payer, and one of the beneficiaries in the purview of this contract, cannot prosecute this action. He is the real party in interest. He is taxed with payment of his *pro rata* of the annual rental. The town cannot maintain this action for the loss sustained by him by reason of the defendant's failure to perform the provisions of the contract above recited. For this injury the plaintiff alone can sue. This point was discussed and settled in *Gorrell v. Water Co.*, 124 N. C., 598, 70 Am. St. Rep., 598, 46 L. R. A., 513, which has been followed in *Fisher v. Water Co.*, 128 N. C., 375, and cited and approved in *Lacy v. Webb*, 130 N. C., 546, and *Gastonia v. Engineering Co.*, 131 N. C., 366, in which last the doctrine is elaborated. The same principle had been often affirmed prior to Gorrell's case, to-wit, that the beneficiary of a contract, though not a party to it nor expressly named therein, can maintain an action for a breach of such contract causing injury to him, if the contract was made for his benefit. Among the many cases to that effect are *Sherrill v. Telegraph Co.*, 109 N. C., 527 (action for failure to deliver telegram); S. C., 116 N. C., 658, and *Shoaf v. Ins. Co.*, 127 N. C., 308; 80 Am. St. Rep., 804. This contract specifies that the defendant shall furnish the town "and *its*

inhabitants * * * all water necessary for fire extinguishing."

The real point in this case is that section 1 of the contract sets out that the defendant "shall provide means and apparatus which will enable it at all times within four minutes *after a call for such pressure* has been given by the proper officer of the fire department of said town, to furnish to said town for fire service ten fire streams from any ten hydrants to a vertical height of one hundred feet in still air, such stream being taken from the hydrant with one hundred feet of hose and a one-inch nozzle," subject to provisions in sections 12, 13 and 14. These latter sections provide that if, on a test, the defendant gives only nine streams one hundred feet high within four minutes after notice, the rental of $4,000 (allowed if ten streams of required height are furnished) shall be reduced to $3,950; if only eight such streams, then only $3,850; if only seven, then the rental shall be $3,600, and so on down to five streams of requisite height and size His Honor instructed the jury, that by virtue of these provisions that unless notice of four minutes, or other reasonable notice, was given the defendant the plaintiff could not recoverr. In this there was error. The pressure to throw ten streams and not less than five streams one hundred feet vertical in still air was an extraordinary pressure required upon four minutes' notice to show the capacity of the water plant and as a means of measuring the rental to be paid. This stipulation has no bearing upon the duty of the defendant to furnish a supply of water "adequate for the extinguishment of fires" as provided in sections 2, 3, 5 and 6 of the contract. These provisions in sections 2, 3, 5 and 6 were in force at all times, and it did not require four minutes' notice to make adequate the pressure which threw the water "only twenty feet high, being only half-way to the eaves." If the complaint had been that

the ten streams or seven streams of specified height and size were not furnished, then the four minutes' notice should be alleged and shown, but not in this case.

Error.

BANK v. HOLLINGSWORTH.

(Filed May 24, 1904).

1. PARTNERSHIP—*Notice—Corporations—Dissolution of Corporations.*

Where a dissolution of a firm occurs by operation of law, by the death of one of the partners, the giving of notice of such dissolution is not necessary to prevent liability from attaching to the estate of the deceased partner or of the surviving partners for any future contracts made in the name of the firm.

2. PARTNERSHIP—*Dissolution—Negotiable Instruments.*

A surviving partner has no power after dissolution to renew or endorse a firm note in the name of the firm.

3. PARTNERSHIP — *Dissolution of Partnership — Negotiable Instruments.*

A surviving partner, who, more than two years after dissolution of the firm endorsed a note in the firm name for the renewal of notes outstanding similarly endorsed, was individually liable on such endorsement, though it did not bind the firm.

4. PAYMENTS—*Negotiable Instruments.*

The giving of a note for a debt is not a payment thereof unless it is so received.

5. PARTNERSHIP — *Corporations—Negotiable Instruments—Fraud—Subscriptions—Stock.*

Where a surviving partner of a firm, who was personally liable on an endorsement of a note in the firm name without authority, organized a corporation and transferred the assets of the firm to such corporation in payment of his subscription to the corporation's stock, without intent to defraud his creditors, the corporation was not liable for such debt.

BANK *v.* HOLLINGSWORTH.

ACTION by the National Bank of Maryland against J. B. Hollingsworth and others, heard by *Judge W. A. Hoke* and a jury, at March Term, 1903, of the Superior Court of BUNCOMBE County.

On and prior to the 5th day of September, 1895, C. L. Cottrell, A. S. Watkins and W. S. Robertson, of Richmond, Va., under the firm name of Cottrell, Watkins & Co., conducted a hardware business in the city of Richmond. This firm, some years prior to said date, purchased the stock of goods of Van Gilder & Brown, of Asheville, N. C., and formed a copartnership with Joseph E. Dickerson of said city of Asheville, under the firm name and style of J. E. Dickerson & Co., for the purpose of conducting a hardware business at Asheville. The business of said firm was kept separate and apart from that of Cottrell, Watkins & Co. Dickerson had no interest in the business of the Richmond firm. On September 5, 1895, O. L. Cottrell died, and from that time until December 12, 1895, the surviving partners, both of Cottrell, Watkins & Co. and J. E. Dickerson & Co., continued the business with a view of winding up both concerns. On December 12, 1895, J. E. Dickerson purchased from the surviving partners of Cottrell, Watkins & Co. and the administrator of the deceased partner their interest in the assets and property of the firm of J. E. Dickerson & Co. At said date the firm of J. E. Dickerson & Co. was indebted to the firm of Watkins, Cottrell & Co. in the sum of about $16,000. Dickerson agreed to assume and pay this amount and all other debts of the firm of J. E. Dickerson & Co., and in addition thereto to pay to the surviving partners and the representatives of the deceased partner of the firm of Cottrell, Watkins & Co. the sum of $16,500, making a total indebtedness to the firm of Cottrell, Watkins & Co. of $32,500; of this amount he paid $8,000 in cash and thereafter $2,000, leaving an indebtedness in May, 1897, of about

$23,000. On March 7, 1896, A. S. Watkins, another member of the firm of Cottrell, Watkins & Co., died. Dickerson agreed to reduce the debt of $23,000 from time to time until within three years it was to be extinguished. On May 7, 1897, Robertson, the surviving partner, together with the administrators of Cottrell and Watkins, learned for the first time that Dickerson had organized a corporation with a capital stock of $30,000, of which he owned twenty-nine-thirtieths, the balance thereof being in the hands of W. H. Penland and S. T. Dorsett. Upon being asked for security for the indebtedness due Cottrell, Watkins & Co. as aforesaid, Dickerson agreed to deposit with Robertson his certificate of stock in the corporation of the J. E. Dickerson Company. The certificate of stock was not actually delivered at that time, as it had not been printed and issued, but on May 18, 1897, he complied with his promise by enclosing to Cottrell, Watkins & Co., at Richmond, a certificate for 290 shares of stock in the J. E. Dickerson Company, with a power of attorney signed in blank to transfer the same, to be held as collateral security for the debt of $23,000 due Cottrell, Watkins & Co. as aforesaid, and to indemnify the said firm against loss on account of certain endorsements which it had made for Dickerson on some notes of the late firm of J. E. Dickerson & Co. in one of the Richmond banks. These notes they subsequently paid. In consideration of giving this security, Dickerson was to have five years in which to pay the debt of $23,000. Robertson, the surviving partner, and the administrators of the deceased partners, at the time of taking said stock as collateral security, had no knowledge or suspicion that Dickerson was financially embarrassed. They accepted the stock without inquiry or investigation as to the financial condition of Dickerson. From the date of the receipt of said stock, May 18, 1897, until September 22, 1897, there was no communication between

Dickerson and the holders of the stock. On September 26, 1897, Robertson, surviving partner, learning of the failure of the bank in Asheville, of which Dickerson was a director, visited Asheville for the purpose of looking into the condition of the affairs of the J. E. Dickerson Company. After a conference with Dickerson and his counsel and an examination into the assets and affairs of the corporation, on September 26, 1897, the said J. E. Dickerson, in discharge and extinguishment of the said indebtedness to Cottrell, Watkins & Co., amounting to about $20,000, sold and transferred to W. S. Robertson, surviving partner of Cottrell, Watkins & Co., all of his right, title and interest in the said 290 shares of the capital stock of the J. E. Dickerson Company, which had been held by the said Robertson as collateral security as aforesaid. The remaining ten shares of the capital stock of said company was also transferred to said Robertson by the owners thereof. J. E. Dickerson also transferred and assigned all of his right, title and interest in the goods, chattels, bills, notes, and other assets of every kind and character owned by or belonging to the J. E. Dickerson Company, together with a certain sewing machine business owned by J. E. Dickerson, and all sewing machines, etc., belonging to and used by him in said sewing machine business, and all accounts due him in said business. On the same day the said J. E. Dickerson executed an assignment to the said W. S. Robertson, surviving partner as aforesaid, for all his right, title and interest in all property of every kind and character belonging to the firm of J. E. Dickerson & Co., as well as the corporation known as the J. E. Dickerson Company, and also all the capital stock of said corporation. On the same day the said W. S. Robertson, surviving partner as aforesaid, executed to J. E. Dickerson a full release of the said indebtedness due the firm of Cottrell, Watkins & Co., as aforesaid. Robertson at the same time and in the same

instrument agreed to collect certain notes therein set forth, which had been held by the firm of Cottrell, Watkins & Co., and pay the proceeds thereof to the wife and son of J. E. Dickerson in the proportions therein set forth. On September 30, 1897, Robertson, surviving partner as aforesaid, filed a bill in equity in the Circuit Court of the United States for the Western District of North Carolina against the J. E. Dickerson Company and J. E. Dickerson, trading as J. E. Dickerson & Co., reciting the matters and things hereinbefore set forth, and further setting forth that certain attachments had been levied upon the property of the J. E. Dickerson Company, against the said J. E. Dickerson, trading as J. E. Dickerson & Co., and asking that a receiver be appointed to take charge of the stock, assets and other property of the J. E. Dickerson Company and to pay all of its debts and wind up its business, and pay over to the plaintiff the balance remaining in his hands.

On September 30, 1897, an order was made in said cause appointing J. E. Rankin receiver of said corporation and of its property of every kind and character. The said receiver executed bond in accordance with the provisions of said order and took into his possession the property of said corporation. Thereafter other orders were made in said cause from time to time in regard to winding up the business of the corporation and disposition of the assets; and on November 6, 1897, an order was made allowing the attorneys of the plaintiff to enter a special appearance for the purpose of moving to dismiss the bill on the ground that the suit was collusive and was filed by both plaintiff and defendant for the purpose of defrauding other parties in interest. No further action was taken in this suit. The record shows that on February 24, 1896, J. E. Dickerson, W. H. Penland and S. T. Dorsett filed in the office of the Secretary of State articles of incorporation of the J. E. Dickerson Company, and that

pursuant thereto the Secretary issued to said company a certificate of incorporation bearing date February 27, 1896. The capital stock of the corporation was fixed at $5,000, with the privilege of increasing it to $100,000, divided into shares of $100 each. Books of subscription were opened and capital stock subscribed as follows: J. E. Dickerson 48 shares, $4,800; S. T. Dorsett one share, $100; W. H. Penland one share, $100, and Dickerson advanced the amount to pay for the said two shares. On March 14, 1896, at a meeting of the stockholders, by-laws were adopted and the following officers elected: W. H. Penland, president; J. E. Dickerson, secretary and treasurer, and S. T. Dorsett, W. H. Penland and J. E. Dickerson, directors, and the following entry was made: "The directors were directed to consider the advisability of purchasing the stock and good will of J. E. Dickerson & Co. and of increasing the capital stock from $5,000 to $30,000." At an adjourned meeting, March 17, 1896, it was voted to increase the capital stock to $30,000, whereupon J. E. Dickerson subscribed 250 shares, and the following endorsement was made on the minutes: "The secretary and treasurer was instructed to purchase the stock and good will of J. E. Dickerson & Co. for the corporation at a valuation as shown by the inventory to be taken on August 1, 1896, the corporation to take the business after August 1, 1896." J. E. Dickerson executed his note to the corporation for the capital stock subscribed by him, and thereafter said note was paid by a transfer to the corporation of the goods and assets of J. E. Dickerson & Co. Books were opened by the J. E. Dickerson Company and the business conducted by the corporation. Certificate No. 1 was issued to J. E. Dickerson for 290 shares of the capital stock of the company, said certificate bearing date May 1, 1897, endorsed September 25, 1897, as follows: "For value received I hereby sell, assign and transfer to W. S. Robertson, surviving partner

of Cottrell, Watkins & Co., 290 shares of the within mentioned stock of the J. E. Dickerson Company, and hereby constitute and appoint Fred Moore, attorney irrevocable to transfer the said stock on the books of said company, with full power of substitution in the premises." Signed J. E. Dickerson and duly attested.

There was evidence tending to show that the stationery used by the J. E. Dickerson Company, upon which was printed J. E. Dickerson & Co., was that remaining on hand of J. E. Dickerson & Co., and that letters were written by the Cottrell-Watkins Company addressed to the J. E. Dickerson Company and J. E. Dickerson & Co. in regard to the business transactions, etc., and that invoices were made out to J. E. Dickerson & Co. There was also evidence that checks were signed, in the course of business of the J. E. Dickerson Company, in the name of J. E. Dickerson & Co. It was also in evidence that the Asheville bank kept an account of J. E. Dickerson and J. E. Dickerson & Co., and that notes were endorsed in the name of J. E. Dickerson & Co.; that actions were brought in a justice's court in the name of J. E. Dickerson & Co. upon accounts due the firm prior to the death of Cottrell. The business was conducted at the same place and the sign was not removed.

On July 15, 1897, the defendant, J. B. Hollingsworth, executed his promissory note payable to J. E. Dickerson & Co. in the sum of $1,900, due and payable four months after date at the First National Bank of Asheville. Said note was endorsed "J. E. Dickerson & Co." to the said bank, and by it endorsed to the plaintiff, the National Union Bank of Maryland. When the note became due, it was presented for payment to the First National Bank of Asheville and also to J. E. Dickerson and to the defendant Hollingsworth, and payment thereof was refused and the note protested.

The plaintiff alleged and introduced testimony tending

to show that on May 25, 1893, the plaintiff bank, at the request of the First National Bank of Asheville, re-discounted for said bank several thousand dollars of notes, which notes had been discounted by and were then the property of the First National Bank of Asheville, and which were for valuable consideration, and before maturity endorsed by the Asheville bank to the plaintiff, thereby becoming the property of the plaintiff. Among said notes were several which bore the endorsement of J. E. Dickerson & Co., which was at that time the firm composed of J. E. Dickerson, O. L. Cottrell, A. S. Watkins and W. S. Robertson, one being a note by Hollingsworth for $4,900. The plaintiff bank made an investigation of the financial standing and responsibility of the makers and endorsers of said notes, and ascertained that Cottrell, Watkins and Robertson were solvent and worth large amounts of property. Said notes were not paid at maturity, but renewals were executed by the original makers and made payable to the defendant J. E. Dickerson & Co., and endorsed by J. E. Dickerson & Co. and the First National Bank of Asheville, and by said bank deposited with the plaintiff, "which said renewals were accepted by the plaintiff in settlement of the original notes referred to; and from May 25, 1893, up to and including July 15, 1897, during a long course of business, the original makers of said notes, not being able to meet them at maturity, executed renewals thereof which were endorsed by the defendant J. E. Dickerson & Co. and by the First National Bank of Asheville, and were afterwards deposited by the First National Bank of Asheville with the plaintiff in payment of the notes hereinbefore referred to, and that said note of $1,900 was given in renewal of other notes, the original of which was dated some time in the year 1893." The defendants deny that at any time after September 5, 1895, the firm of J. E. Dicker-

son & Co. endorsed any note or notes to the First National Bank of Asheville or the plaintiff in this action.

The plaintiff alleges that it re-discounted these notes for the Asheville bank, relying upon the financial worth and responsibility of Cottrell, Watkins and Robertson, and it had no notice of the dissolution of the firm of J. E. Dickerson & Co., and that no such notice was ever published or advertised in any paper in the State of North Carolina or elsewhere, and that no notice whatever was given to the plaintiff of said dissolution, and that the plaintiff knew nothing of the attempted dissolution of the firm until the failure of the bank at Asheville. J. E. Dickerson was director of the Asheville bank and continued such until its failure. That the note for $1,900 was executed by Hollingsworth as an accommodation for the purpose of enabling the J. E. Dickerson Company to receive the proceeds thereof, and the proceeds were credited on the books of the Asheville bank to an account in the name of J. E. Dickerson & Co., for the use and benefit of the J. E. Dickerson Company, and the said J. E. Dickerson concealed the fact from the plaintiff, as well as from the Asheville bank, of the withdrawal of Cottrell, Watkins & Co. from the firm, etc. The plaintiff further alleged that J. E. Dickerson continued the business at the old stand, and under the old name of J. E. Dickerson & Co., advertising to the world that the business was being conducted, as it had been for many years prior thereto, under the name of J. E. Dickerson & Co.; and that at the time the said J. E. Dickerson pretended to purchase from his co-partners the said business, the said J. E. Dickerson and the firm of J. E. Dickerson & Co. were largely indebted to various persons, including the plaintiff, in large sums of money—about $20,000—and in order to cheat and defraud the plaintiff and his other creditors of the money which he and the firm of J. E. Dickerson & Co. owed them, the said Dicker-

son endeavored to have the business incorporated under the name of the J. E. Dickerson Company; that the incorporators and stockholders of said corporation were W. H. Penland and S. T. Dorsett, and that they never in fact owned any of the stock of said corporation; that it was subscribed for by them at the request of J. E. Dickerson in order to consummate the fraud. All of these allegations were denied by the defendants, J. E. Rankin receiver and the J. E. Dickerson Company.

W. H. Penland was cashier and S. T. Dorsett teller of the First National Bank of Asheville during the time that the transactions herein were being conducted. Penland and Dorsett knew of the death of Cottrell, but there was no direct evidence that the president of the bank knew it. The defendant Robertson testified that he knew nothing of the indebtedness to the Asheville bank, or to the plaintiff bank, of J. E. Dickerson or J. E. Dickerson & Co.; that he did not learn of the existence of this note until a few days before this suit was brought. He denied that there was any purpose on his part, in taking the security from Dickerson, to defraud any of the creditors of Dickerson; and that the debts of J. E. Dickerson Company have been paid in full. J. E. Dickerson further testified that the original note of $4,900, and the several notes given in renewal thereof, were made for the accommodation of the Asheville bank to enable them to discount them and to get the money on it, and that neither J. E. Dickerson & Co. nor the J. E. Dickerson Company received any benefit whatever therefrom; that the proceeds of the note were credited to Hollingsworth and afterwards charged to "bills payable."

The defendants, who answered, tendered the following issues:

1. "Were the defendants J. E. Dickerson, W. S. Robert-

son, O. L. Cottrell and A. S. Watkins copartners trading as J. E. Dickerson & Co. on the 15th of July, 1897?"

2. "Did J. E. Dickerson, W. S. Robertson, O. L. Cottrell and A. S. Watkins, under the firm name and style of J. E. Dickerson & Co., and the defendant J. E. Dickerson Company, for value, endorse the note sued on to the First National Bank of Asheville?"

3. "Did the First National Bank of Asheville thereafter endorse the note sued on to the plaintiff?"

4. "Was said note duly presented to J. E. Dickerson, W. S. Robertson, O. L. Cottrell and A. S. Watkins, trading as J. E. Dickerson & Co., when it became due, and was the same duly protested as to them?"

5. "Did the defendant J. E. Dickerson & Co. receive the benefit and advantage of the money paid by the plaintiff for the note sued on?"

6. "Did the defendant assign and sell on or about the 27th of September, 1897, at a time when it was insolvent, its assets and property to W. S. Robertson, with intent to defraud its creditors?"

His Honor declined to submit the issues tendered, and in lieu thereof submitted the following:

1. "Are the defendants J. B. Hollingsworth, J. E. Dickerson & Co. and the First National Bank of Asheville indebted to the plaintiff; and if so, in what sum?"

2. "Is the defendant J. E. Dickerson Company indebted to the plaintiff, and if so, in what amount?"

3. "Is the defendant W. S. Robertson personally indebted to the plaintiff; and if so, in what amount?"

4. "At the time the action was commenced and attachment levied, did the defendants W. S. Robertson and J. E. Rankin, receiver, hold the property levied on in this cause in trust to satisfy the present claim and demand of the plaintiff?"

The only defendants who answered were the J. E. Dickerson Company and J. E. Rankin, receiver, but the defendant Robertson, after answers filed, having been made a party defendant and served by publication of summons, adopted the answer filed by his co-defendants. The defendants excepted to the refusal to submit the issues tendered, and to the issues as submitted.

The defendants submitted a series of instructions presenting their contentions and requested the Court to charge the jury in accordance therewith, all of which were declined. His Honor charged the jury that if they believed the evidence they should answer the first, second and fourth issues "Yes." To the refusal to give the instructions asked, and to the instructions given, the defendants Rankin, receiver, Robertson, and the J. E. Dickerson Company, excepted, and appealed from the judgment rendered upon the verdict.

Julius C. Martin and *Charles A. Webb*, for the plaintiff.

Moore & Rollins and *George L. Christian*, for the defendants.

CONNOR, J. This action is prosecuted by the plaintiff for the purpose, first, of recovering a judgment against J. E. Dickerson & Co., including the defendant Robertson; second, against the J. E. Dickerson Company, and third, for the purpose of subjecting the assets of the J. E. Dickerson Company in the hands of the receiver to the payment of such judgment. There is no controversy in regard to the liability of Hollingsworth, the maker of the note, or of J. E. Dickerson and the Asheville bank as endorsers. His Honor having instructed the jury to answer the third issue "No," upon this appeal the question as to the liability of Robertson is eliminated. The personal representatives of Cottrell and Watkins not being parties, no question is presented in respect

to the liability of the deceased partners. We take it to be elementary that the death of Cottrell worked, by operation of law, a dissolution of the firm of J. E. Dickerson & Co. George on Partnership, 257; Bates on Partnership, section 610.

It is equally well settled that where the dissolution is brought about by operation of law, by the death of one of the partners, it is not necessary to give notice to prevent liability attaching to the estate of the deceased partner, or to either of the surviving partners, for any future contracts made in the name of the firm.

In *Martlett v. Jackman*, 3 Allen (85 Mass.), 287, *Bigelow, C. J.*, says: "Two text writers, however, of great learning and authority have laid down the rule that when a copartnership is dissolved by the death of one of the copartners, no notice of the dissolution is necessary, and the surviving partners are not bound by any new contract entered into by one of the firm in the partnership name after dissolution, although it is made with a person who had previously dealt with the firm, and had no notice or knowledge that it was terminated by the death of one of the members"—citing Kent's Commentaries, Story on Partnership, and Colyer on Partnership. The learned *Chief Justice* further says: "Starting, then, with the admitted proposition that death works a dissolution of a firm, and that thereby the estate of the deceased partner and his personal representatives, as well as his share of the assets of the firm, are absolutely relieved and absolved from any new contracts or subsequent transactions of the surviving partners, which are not necessary to the settlement of the joint business, the inquiry at once arises as to the effect of such a dissolution, caused by the act of God, on the relative rights and duties of the surviving copartner. One of the essential elements of the contract of copartnership consists in the right which each member has to the continuance of all his associates as mem-

bers of the firm. * * * When therefore by the death of a member of the firm his personal liability ceases, and his estate is by operation of law absolved from all future contracts and transactions entered into in the name of the firm, it would seem to follow, as a necessary consequence, that the power of the surviving copartners to bind each other by new contracts and engagements must at once cease. The copartnership would then be terminated, not only as to the deceased partner and his estate but also as to the other members of the firm. The *delectus personarum* would not longer exist."

It seems to be equally well settled that a surviving partner has no power, after dissolution, to renew or endorse a note in the name of the firm. "The dissolution operates as a revocation of all authority for making new contracts. It does not revoke the authority to arrange, liquidate, settle and pay those before created. The implied power of the ex-partner does not extend to giving a note or to drawing a bill in the firm's name; nor could he bind the firm by a check in its name. Renewals of outstanding bills or notes of the firm stand on the same footing; and as the ex-partner could not draw a bill or note for a firm debt, neither could he renew a bill or note of the firm given for their debt." Daniel Neg. Inst., section 370. "Where a note is issued by a partner after dissolution it will not bind the other partners, even though given for a debt due by the firm." *Ibid.*, 371. "Where the dissolution is by the death of one of the partners, the surviving partner may endorse a note payable to the firm *in his own name.*" *Bristol v. Sprague,* 8 Wend., 423; *Whitman v. Leonard,* 3 Pick. (20 Mass.), 177; *Charles v. Remick,* 156 Ill., 327; *Woodson v. Wood,* 84 Va., 478; *Lusk v. Smith,* 8 Barb., 570; *Myatt v. Bell,* 41 Ala., 222.

In *Abell v. Sutton,* 3 East., 110, *Lord Kenyon* said, in regard to the liability of a partner for an endorsement made

after the dissolution of the firm: "To contend that this liability to be bound by the acts of his partner extends to times subsequent to the dissolution, is to my mind a most monstrous proposition. A man, in that case, could never know when he is to be at peace and retired from all the concerns of a partnership." 22 Am. & Eng. Ency., 214. "A note given by one partner, after dissolution of the partnership, does not bind the other partner, although given in the partnership name and in consideration or settlement of a subsisting partnership liability." *Haddock v. Crocheron*, 32 Tex., 277, 5 Am. Rep., 244; *White v. Tudor*, 24 Tex., 639, 76 Am. Dec., 126; *Fellows v. Wyman*, 33 N. H., 351.

It is claimed, however, that the note in suit was given in renewal of notes executed by the same persons. The contention in regard to this phase of the case is: The defendant Hollingsworth executed a note payable to J. E. Dickerson & Co. for $4,900 in August, 1893, which was endorsed to and discounted by the Bank of Asheville, and endorsed to and re-discounted by the plaintiff bank. This note, at maturity, was returned to the Asheville bank, endorsed for collection, and charged to said bank by the plaintiff bank. Upon its receipt by the Asheville bank, it was credited to the plaintiff bank. The Asheville bank then procured a renewal note from the same parties, which was sent to the plaintiff bank for re-discount. It was in evidence that the plaintiff bank was under no obligation to re-discount the note thus taken in renewal. It would seem that each re-discount by the plaintiff bank was a separate and distinct transaction. It was in evidence that each note, as it was sent to the Asheville bank and a new one taken, was marked "paid" and surrendered to the makers. Whether these transactions, resulting in the execution of the note in suit, operated as a payment of the original note, it is not necessary to decide. What constitutes a payment, otherwise than by money, is usually a

mixed question of law and fact, dependent frequently upon the intention of the parties. It is undoubtedly true that the renewal of the note, secured by mortgage or collateral, will not operate to discharge the security. It is equally well settled that the giving of a note or draft for an existing indebtedness does not operate, unless so agreed by the parties, to extinguish the original indebtedness, and upon the dishonor of the note or draft the creditor may sue upon the original consideration. "A note given by all the parties to pay for the goods delivered would not extinguish the original undertaking like a bond or judgment taken for it. The plaintiffs might still maintain their action for goods sold and delivered, provided they produced and delivered up the note on trial, or proved it was destroyed." *Wilson v. Jennings*, 15 N. C., 90, cited in *Mauney v. Coit*, 86 N. C., 471. "The general doctrine is that the mere giving of a note for a debt is not a discharge or payment of the debt, and the note may be surrendered and a recovery had on the debt. But, if there are any facts tending to show that the note, even when given by one of several joint debtors, was received in payment of the debt, then it becomes a question for the jury to determine whether it was so received, and if they find that it was, *then* no action can be maintained on the debt." *Lee v. Fountain*, 10 Ala., 755, 44 Am. Dec., 505.

In *Spear v. Atkinson*, 23 N. C., 262, the plaintiffs sold a bill of goods to the defendants for which they gave their promissory note. Afterwards one of the defendants drew a bill of exchange in favor of the plaintiffs and took up the promissory note. The bill was presented for payment and dishonored. There was no proof that the bill had been returned to the drawer, or that the plaintiffs ever offered to surrender it at the trial. In an action in assumpsit on the original bill of goods, the plaintiffs were nonsuited and the judgment affirmed, *Daniel, J.*, saying: "If the plaintiffs

therefore had surrendered the bill, even on the trial, they might have recovered upon the original consideration; for the taking of the note first, and then the bill, did not merge the original consideration, as a bond would have done."

The right of the creditor in such case is to sue upon the original consideration or contract. If, by any act of his, either of the original debtors is released, as by extending the time of payment upon valuable consideration or otherwise, such defense must be set up by such debtor. This action being upon the note executed July 15, 1897, more than two years after the death of Cottrell and the dissolution of the partnership, and also after the purchase by Dickerson of the interest of the surviving partners in the assets of the old firm of J. E. Dickerson & Co., the action cannot be maintained as upon a bond endorsed by the firm of J. E. Dickerson & Co. J. E. Dickerson is of course individually liable, and the fact that he endorsed the note as J. E. Dickerson & Co. in no manner affects his individual liability. It would be a singular result, and work a great hardship upon partners, if they could be bound upon endorsements made by their late partners under the circumstances existing in this case.

The plaintiff, however, says that it is entitled to judgment against the corporation, the J. E. Dickerson Company, and his Honor was of that opinion. This contention is based upon the theory that it permitted its business to be conducted in the name of J. E. Dickerson & Co.; that the business sign was never changed, the same stationery was used, goods were bought and sold in the name of J. E. Dickerson & Co., the correspondence was carried on in that name and the account at the bank was kept in that name. There can be no question as to the validity of the articles of incorporation. Whatever may have been the motive of Dickerson in forming the corporation, it became a *de jure* as well

as a *de facto* corporation, and could only be bound upon contract made in its corporate name and for corporate purposes, or for debts for which it had received the consideration. This note was never payable to the corporation, was not executed in consideration of any debt due the corporation, was never endorsed by any officer of the corporation in his official capacity, and it is difficult to perceive how it could have become liable *upon the cause of action* set forth in the complaint, that is, the promissory note of Hollingsworth. The cashier of the bank, its teller, and one of its directors, knew of the existence of the corporation, and knew that it had purchased the assets and stock of J. E. Dickerson & Co., and that J. E. Dickerson & Co. had ceased to exist in respect to the hardware business. It is not necessary for us to decide to what extent the knowledge of these persons is to be imputed to the bank, as fixing it with notice of the status of the parties. Certainly, if his Honor was correct in telling the jury that, upon the evidence, the firm of J. E. Dickerson & Co. was liable upon the endorsement, this would exclude the idea that the J. E. Dickerson Company was liable upon the same endorsement. It must be kept in mind that this action is upon *the endorsement upon the note, and not upon an open account* or other form of indebtedness by the corporation to the Asheville bank. In order to maintain its action against the J. E. Dickerson Company, the plaintiff must connect the corporation with and make it a party to the note of Hollingsworth, because it was only in this way that it acquired any right of action. We therefore conclude that, upon the issue as submitted to the jury, and upon the evidence introduced by the plaintiff, his Honor was in error in charging the jury to answer the second issue in the affirmative.

The plaintiff says that however this may be, J. E. Dickerson was, in any point of view, personally liable upon the

endorsement, and that he formed the corporation for the purpose of defrauding his creditors; that pursuant thereto, and in execution of such fraudulent purpose, he transferred his property to the corporation; that the transfer of the stock, followed by the absolute sale thereof to the defendant Robertson, was a fraud upon his creditors. For the purpose of examining this phase of the case, the intent with which Dickerson *formed the corporation of J. E. Dickerson Company* is material only as a circumstance or fact to be considered by the jury in connection with other facts. He had a legal right to do so. In the transfer of the assets of J. E. Dickerson & Co. to said corporation, and taking in payment therefor the stock of said corporation, he committed no fraud upon his creditors unless done with a fraudulent intent. The shares of stock represented the property which he put into the corporation, and was liable for his debts as the property would have been. The deposit of this stock as collateral security for the debt due Cottrell, Watkins & Co. was based upon a valuable consideration, and was a valid transaction as against his other creditors in the absence of any fraudulent intent. The subsequent sale of the stock, in consideration of the release of the indebtedness to Cottrell, Watkins & Co., was, in the absence of fraud, valid against all persons except the creditors of the J. E. Dickerson Company. The payment of these creditors was assumed by Robertson, and it is in evidence that all of the creditors of the corporation, proving their claims pursuant to the orders in the suit in equity, have been paid.

The plaintiff, however, says that the corporation took the property subject to the debts of J. E. Dickerson or J. E. Dickerson & Co., or, in the language of the brief: "When a corporation takes the assets of an individual or partnership concern and issues in payment therefor its stock, as was done in this case, the assets thus passing to the corpo-

ration remain liable for all the debts of the concern." Upon this principle the plaintiff contends that the J. E. Dickerson Company is liable for the note in controversy.

It seems well settled "that a corporation buying all the property of another corporation, paying therefor in stock of the former corporation issued to the stockholders of the latter corporation, must either pay the obligations of the latter corporation or have the property sold to pay such obligations." Cook on Corp., section 673. This doctrine is based upon the principle that corporate property is held in trust, first, for the benefit of the creditors of the corporation, and then for the stockholders, and that such trust attaches to it in the hands of the new corporation.

In *Ins. Co. v. Transportation Co.,* 13 Fed. Rep., 516, *McCrary, C. J.,* says: "A distinction with respect to transactions of this character exists between a corporation and a natural person. A natural person may sell all of his property for a fair consideration if the transaction is *bona fide,* and the buyer will not be required to take care that the seller provides for and pays all of his debts. A corporation, unlike a natural person, by disposing of all its property, may not only deprive itself of the means of paying its debts, but be deprived of corporate existence and place itself beyond the reach of processes at law. At all events, equity cannot permit the owners of one corporation to organize another and transfer from the former to the latter all of the corporate property without paying all of the corporate debts." Taylor on Corp., 655. It is also said that "where a corporation formed by and consisting of the members of a copartnership takes a conveyance or assignment of all of the assets of the partnership for the purpose of continuing the business, it is to be presumed that it has assumed the partnership debts and it is *prima facie* liable therefor." Clark & Marshall on Corp., 346. The same writer says: "But a corpora-

tion that has taken over the property of a partnership is not liable for the debts of the latter, until it is shown that the sale was fraudulent as to the creditors of the latter, or that there was an express contract to assume such liability, or that the transaction was a mere continuation of the partnership."

All of the cases to which our attention has been called have arisen in an effort of the creditors of the first corporation, or of the partnership, to follow the property impressed with the trust into the new corporation. In *Andres v. Morgan,* 62 Ohio St., 236, 78 Am. St. Rep., 712, the facts were that certain persons were conducting business as a partnership known as the Franklin Mill Co.; the partnership being indebted, a corporation was chartered and organized, the property being transferred to the corporation, each partner taking stock representing his interest in the partnership property; the corporation becoming insolvent executed a deed of trust; the creditors of the partnership sought to prove their claims against the assets of the corporation: *Marshall, J.,* says: "On this state of the case it is very clear that the corporation was liable for this debt, whether it had expressly assumed the indebtedness of the partnership or not. It is not to be regarded as an ordinary sale of property by one to another. A partnership is a *quasi* legal entity. It owns property and has liabilities as such. Its creditors have a right to the payment of their claims from the partnership assets in preference to individual creditors, and have, in equity, a lien on the assets of the firm that may be worked out through the partners. So that, when the partners transferred all of the property of the firm to the company, the partnership was dissolved and the rights of its creditors followed the partners and the property into the corporation, and it was bound to discharge the debts of the partnership, having received the property of the partner-

ship on which it had obtained credit. It could not retain the property and repudiate the liability."

A careful examination of the authorities fails to disclose any case in which the principle (upon which a new corporation becomes liable by reason of taking the assets of the old corporation or a partnership) is applied to the transfer of property by an individual in payment of his subscription to the capital stock of a corporation—in the absence of any finding that such transfer was made with intent to defraud his creditors.

In *Austin v. Bank,* 35 L. R. A., 444, 59 Am. St. Rep., 543, the facts were: Russell & Holmes were engaged in business as bankers. The plaintiff deposited with them the sum of $300 and received a certificate therefor. The firm went into liquidation, closed its business and organized a corporation having the name of "The Bank of Russell & Holmes" and engaged in the business of banking as the successor of said bankers Russell & Holmes. Thereafter, the Bank of Russell & Holmes went into liquidation and closed its business, when the defendant bank was duly organized and created by virtue of the National Banking Act. The plaintiff sued the defendant bank on his certificate of deposit, alleging that the defendant was organized, created and came into possession of the property, assets, etc., of the Bank of Russell & Holmes and of the late firm of Russell & Holmes, and that thereby the defendant bank became liable to the plaintiff for the deposit so received. The plaintiff alleged that the business of the defendant bank was carried on in the same building previously occupied by the Bank of Russell & Holmes, and that all the owners and officers of said bank became stockholders of the corporation bank and as such managed and controlled its business, whereby the defendant assumed this indebtedness and became liable therefor. The plaintiff further alleged that the Bank of Russell

& Holmes was wholly insolvent. The defendant denied the material allegations of the complaint. The Circuit Court gave to the jury a peremptory charge to find for the defendant. Upon appeal, *Post, C. J.*, said: "The judgment of the District Court appears to rest upon the conclusion that the plaintiff has failed to state a cause of action against this defendant, and our investigation of the subject has led to the same result. It will be observed, from a careful reading of the petition, that it is not charged that the Bank of Russell & Holmes became a national bank; that said corporation was reorganized under the National Banking Act or otherwise; that its liabilities, or any part thereof, were in fact assumed by the defendant herein; or that the latter did not, in good faith, in the usual course of business, purchase and pay for the rights and property therein described." After discussing the question involved, the *Chief Justice* concludes: "There are to be found in the reports and text-books expressions apparently sustaining the proposition that a corporation which upon its organization succeeds to the business and property of another corporation or firm, is from that fact alone chargeable with the indebtedness of the latter. It is, for instance, said by Mr. Beach in his excellent work on the Law of Private Corporations, section 360, that, 'Where an old established corporation sells out to a newly organized one and turns over all its property, the new company becomes liable upon the debts and contracts of the old.' The strict accuracy of that statement may, we think, be doubted, in view of the omission therefrom of any reference to the purpose or character of the transaction contemplated, or the consideration therefor." He then proceeds to classify the cases in which such liability attaches: "1. Cases in which the liability of the new corporation results, not from the operation of law, but from its contract relation with the old. 2. Cases in which the transfer of the

property and franchise amounts to a fraud upon the creditors of the old corporation. 3. Cases where the circumstances attending the creation of the new corporation and its succession to the business, franchise and property of the old are such as to raise the presumption or warrant the finding that it is a mere continuation of the former—that it is, in short, the same corporate body under a different name. And the facts upon which such finding or presumption depends will not be presumed, but should affirmatively appear from the pleadings and proofs." It will be observed that there is no suggestion that these principles would apply to the cases in which an individual transferred his property in payment of his stock. We can see no difference between the transaction set forth in this record and the one in which Dickerson had sold his property and taken a note therefor. This certainly would be no fraud upon creditors unless made with a fraudulent intent. If, in the latter case, he had transferred the note to a *bona fide* purchaser for value and without notice, the purchaser would acquire a good title as against his creditors. The case of *Friedenwald v. Tobacco Works,* 117 N. C., 544, comes within the first and third classes. The firm of J. E. Dickerson & Co. was not liable upon this note. J. E. Dickerson, trading under the name of J. E. Dickerson & Co., was personally liable thereon.

For the purpose of passing upon the defendant's exception to his Honor's charge upon the fourth issue, we must assume that he accepted the defendant's testimony as true. From that point of view, the condition of the property at the time of the organization of the corporation was as follows: The firm of J. E. Dickerson & Co. having been dissolved, its entire assets had become the property of J. E. Dickerson by purchase from the surviving partner and personal representives of the deceased partners. This condi-

tion continued from the date of the purchase, December 12, 1895, until August 1, 1896. At that date there were no liens upon the property, and Dickerson had a right to sell it or transfer it to either of his creditors in payment of their debts, provided it was done in good faith. Upon the formation of the corporation an inventory of the goods was taken and the corporation purchased them, issuing to Dickerson stock in payment therefor, Dickerson agreeing to pay the debts of J. E. Dickerson & Co. There was no concealment of the transaction from the First National Bank of Asheville, the cashier being one of the incorporators and knowing all of the facts connected with it. We see no evidence, from the defendants' testimony, at least, tending to show any fraud upon his creditors, except that Dickerson says that his purpose in organizing the corporation was to avoid certain liability on account of a suit in the Federal Court, upon which it seems no judgment has ever been obtained. The shares of stock which were issued to Dickerson were subject to his debts to the same extent as the property assigned to the corporation. There being no liens upon his stock, he had a right to sell it or assign it to either of his creditors. He swears that this was done in good faith without intent to defraud any one. Mr. Robertson says that at the time he took the assignment he knew nothing of Dickerson's indebtedness. When the final transaction occurred, in which Dickerson parted with the title to the stock and all his interest in the goods and other assets of the J. E. Dickerson Company, there was a surrender of the indebtedness to Robertson and the personal representatives of the deceased partners. This certainly constituted Robertson a purchaser for value, and there is no evidence that he had any notice of Dickerson's indebtedness to the bank. We are unable to see why this did not vest in Robertson a perfect title to the stock and to such interest as Dickerson had in

the property, being that which remained after the payment of the debts of the corporation. Robertson having assumed the payment of these debts and they having been paid, no question arises in respect to any indebtedness of the corporation.

The action of Dickerson in respect to the formation of the corporation was, not as a matter of law, a fraud upon his creditors. So far as we can see from his testimony, he regarded the Asheville bank as absolutely solvent. The note upon which he was endorser was made for the accommodation of the bank. It seems from the testimony that he became indebted to the bank in some large amount, but at what time such indebtedness accrued, or exactly how it came about, is not very clear from the testimony. In fact, there seems to be much controversy as to the origin and extent of his indebtedness. Dickerson's testimony tends to show a course of dealing with and on part of the bank which was well calculated to and did result in fraud upon the plaintiff. If his purpose in the formation of the corporation, transfer of his property, and his subsequent dealings in respect thereto with the defendant Robertson, were with a fraudulent intent, and this was known to Robertson, or he was put upon notice, the assignment of stock to him could be set aside by Dickerson's creditors. These, however, were questions of fact which should have been submitted to the jury under proper instructions from the Court. The corporation did not assume the indebtedness of J. E. Dickerson, and is not liable as a corporation therefor unless such liability attaches by operation of law. If there was any fraudulent purpose on the part of Dickerson in transferring the property to the corporation, his creditors had their remedy to follow and subject it to the payment of their debts, unless other and superior rights had attached. Such purpose is

expressly denied by Dickerson. It therefore became an issue of fact to be determined by the jury. Many facts and circumstances are called to our attention as constituting fraud which are competent as evidence, but do not of themselves, considered either singly or taken together, constitute fraud *per se*. "An insolvent owner of property has the same right as one who is solvent to dispose of it by a sale or conveyance to secure a present indebtedness in the absence of an operating bankrupt act, when done *bona fide* and not with the covinous purpose of hindering or defrauding creditors, and the presence of such purpose alike vitiates and avoids the conveyance made by either. When the vitiating intent appears in the instrument itself, the Court ascertains and adjudges the fact and no jury finding is necessary. But when the fraud is to be inferred from surrounding circumstances, and is not an element in the transaction, it must be found by a jury and upon a proper issue framed to raise the inquiry." *Beasley v. Bray*, 98 N. C., 266. The cause should be remanded and a new trial had upon the issue of fraud raised by the pleadings, and the claim of the defendant Robertson that, in any event, he is a purchaser for value and without notice. The burden of proof upon the first issue will be upon the plaintiff, and as to the second upon the defendant. *Cox v. Wall*, 132 N. C., 730. Let this be certified.

New Trial.

PLAINTIFFS' APPEAL.

CONNOR, J. His Honor instructed the jury to answer the third issue: "Is the defendant W. S. Robertson personally indebted to the plaintiff; if so, in what amount?" in the negative. The plaintiff excepted and appealed. For the reasons given in the opinion in the defendants' appeal we are of the opinion that his Honor correctly instructed the

jury. There is no aspect of the testimony in which the defendant W. S. Robertson could be personally liable to the plaintiff. The judgment in that respect must be affirmed.

Affirmed.

EEKHOUT v. COLE.

(Filed May 27, 1904).

1. ATTORNEY AND CLIENT—*Privileged Communication—Witnesses.*

A statement by a client to his attorney that he had procured a loan of some money to pay a fee in a case settled up is not a privileged communication.

2. EXAMINATION OF WITNESSES — *Exceptions and Objections — Judge.*

Where an objection to a question was overruled, and before an answer was given the attorney told the witness to stand aside, it was not error for the court to repeat the question and require the witness to answer it.

3. EXECUTORS AND ADMINISTRATORS—*Contracts.*

A deposit by a person under a previous contract, the same being for the performance of the contract and withdrawn by mutual consent and loaned to the other party to the contract, is a valid claim against the estate of the lendee.

4. EXECUTORS AND ADMINISTRATORS—*Contracts—Evidence.*

The withdrawal by mutual consent of a deposit by a person, the same being for the performance of a contract, is not conclusive evidence that the agreement of forfeiture should no longer be a part of the contract.

ACTION by W. B. Eekhout against C. W. Cole, heard by *Judge* W. A. *Hoke* and a jury, at November Term, 1903, of the Superior Court of CHEROKEE County.

The plaintiff prosecutes this action for the recovery of five hundred dollars, alleged to have been "advanced and loaned" to defendant's intestate, A. G. Kinsey, on November 4, 1901. The plaintiff averred a demand and refusal to pay. Defendant denied each of the allegations of the complaint except the demand and refusal to pay, which he admitted. By way of further defense and counter claim he averred that on July 27, 1901, the plaintiff entered into a contract with the defendant's intestate, by which it was agreed that said Kinsey should secure control of at least a majority of all the stock of the Notla Consolidated Marble, Iron and Talc Company, to be sold to the plaintiff for $5.80 per share. Said stock was to be deposited in escrow in the Bank of Murphy, provided a certain contract of same date between the stockholders of said company and said Eekhout, in regard to the sale of their holdings in said company, be entered into. The agreement contained the following provision: "And in order to show good faith, said W. B. Eekhout has deposited five hundred dollars in the Bank of Murphy, to be forfeited to the said A. G. Kinsey, or assign, if I, the said W. B. Eekhout, fail to comply with the contract referred to. In the event the said A. G. Kinsey fails to get a majority of stock subscribed to said contract of even date, said amount of five hundred dollars shall be subject to the order of W. B. Eekhout by August 15, 1901, and shall not be forfeited in any event if contract of even date be carried out."

Exhibit A attached to the answer is a contract entered into between W. B. Eekhout and certain shareholders of said Iron and Talc Company, the purport of which is that the shareholders agreed to sell their stock to said Eekhout upon certain terms and conditions fully set out herein. The time fixed for performance of said contract is August 1, 1901. The defendant alleged that his intestate, pursuant to said

contract, procured at great outlay and expense a majority of said stock and deposited the same in the Bank of Murphy for said Eekhout. That said Eekhout failed in every respect and in every particular to comply with his contract. That by reason of such failure said Eekhout became indebted to the defendant's intestate in the sum of five hundred dollars. The plaintiff, replying to the new matter and counter claim, denied each and every allegation in regard thereto.

The Court, without objection, submitted the following issues to the jury: "1. Is defendant indebted to plaintiff; and if so, how much? 2. Is plaintiff indebted to defendant on counter claim; and if so, how much?"

Plaintiff introduced Ben Posey, who testified to the handwriting of A. G. Kinsey and his signature to the receipt, which was in the following words:

"MURPHY, N. C., 4 Nov., 1901.

"Received of W. B. Eekhout the sum of five hundred dollars, being the money lodged in the Bank of Murphy in escrow with a certain contract between the said Eekhout and myself and now withdrawn by mutual consent.

(Signed) "A. G. KINSEY."

The plaintiff thereupon testified that he deposited five hundred dollars in the bank and that he drew the same out November 4, 1901. He admitted the execution of the contract of July 27, 1901, and the writing of certain letters put in evidence. Mr. Posey was recalled and testified that he was attorney for A. G. Kinsey on November 4, 1901; that Judge Ferguson and himself had appeared as counsel for him in a suit between Kinsey and Emerson. That the suit was concluded and Kinsey wished to employ them in another suit with one Oliver Kinsey. That witness told Kinsey that they wished payment of their fees. Kinsey replied that

he had no money at that time, when witness insisted on payment of fees for himself and Judge Ferguson. Counsel asked witness what Kinsey said to him about borrowing the money from Eekhout. Defendant's counsel objected on the ground that witness, being at that time Kinsey's attorney, could not testify to a transaction between them. Objection overruled, defendant excepted. Upon the Court's announcing its ruling, the counsel for plaintiff stated that he had no further question to ask witness and told him to stand aside. "The Court perceiving that no answer had been made to the question, and thinking this was an inadvertence of counsel, and moreover desiring to have the facts about the matter before the jury, asked the witness what Kinsey did say about the money—about borrowing the $500 fee. Counsel for defendant objected on same ground, that it was a transaction between attorney and client, and second, because counsel for plaintiff having directed witness to stand aside, the Court had no right to interpose and request an answer from witness. Objection overruled and defendant again excepted. The witness then stated that when he told Kinsey he must have his fee of $500 Kinsey stepped out, remained awhile and then came back in the room and said that he had gotten the money; that he and Eekhout had agreed to withdraw from the bank the $500 on deposit and Eekhout had agreed to lend it to him. The next morning Kinsey came in and said that he had arranged the matter with Eekhout; that the money had been withdrawn by mutual consent and put in the bank to his (Kinsey's) own credit and subject to his check, and Kinsey then gave witness his check for $250, also drew a check for Ferguson for $250, the amount of attorney's fees, and the bank paid them. Plaintiff rested.

Defendant introduced contracts herein referred to, a letter from Eekhout to Kenyon, cashier of bank, enclosing

agreement between Kinsey and himself and check for $500; also stockholder's contract, "Exhibit A."

Plaintiff then introduced J. H. Carter, vice-president of the bank, who testified that he had a package containing certificates of stock of the Iron and Talc Company, "Exhibit 209." That the endorsments upon the envelopes were made by himself, except certain words which are not material. Defendant then introduced the envelope containing the following endorsement: "This envelope contains the following shares of stock of the Notla Cons. M. I. and Talc Co., to-wit." (Then follows a list of the certificates, aggregating 3,721 shares, deposited with Bank of Murphy subject to contract between stockholders and W. B. Eekhout, dated July 17, 1901). It was admitted that the envelopes contained the stock which constituted a majority of the stock issued by said company. The defendant asked the Court to charge the jury that there is no evidence that the money paid Mr. Posey is the money deposited with Eekhout under said agreement. 2d. That the jury must be satisfied that the money received by Mr. Posey was a part of the identical $500 deposited by Eekhout. 3d. That there is no evidence of any abandonment of the forfeiture feature of the contract. All of said prayers were denied, and the Court, in part, charged the jury that plaintiff and A. G. Kinsey, the intestate of the defendant, entered into a contract that Kinsey was to procure for Eekhout a majority of stock in the Marble Company and Eekhout was to pay for it $5.80 per share. To show good faith in the matter, Eekhout put in the bank $500 as a forfeit in case of failure on his part to comply with his offer. That if the evidence was believed, Kinsey did procure the stock and Eekhout had failed to take the stock; and if the money had remained in the bank under the original agreement, or if a forfeiture to that amount continued to be a part of the stipulation, then there

was nothing due from defendant to plaintiff; if, however, Kinsey and Eekhout mutually contracted and agreed to withdraw the money from the bank, and the forfeiture should no longer be a part of the stipulation, and after drawing out the money Eekhout lent the money to Kinsey and same had never been paid, then the defendant was indebted to plaintiff in the sum of $500, with interest thereon from time same had been demanded, and nothing would be due on counter claim. The Court here stated the evidence and the arguments of counsel pertinent to the issues. The jury returned a verdict and answered the first issue "Yes, $500 with interest from date of demand, August 15, 1902," and had not answered the second issue. The Court told the jury that if such was their finding of fact and verdict on the first issue, that it should answer the next issue "No." If they believed the testimony there was nothing due on counter claim, and they would answer the second issue "No." The jury so answered the second issue. Defendant objected and excepted.

From a judgment on the verdict the defendant appealed.

Axley & Axley, for the plaintiff.
E. B. Norvell, for the defendant.

CONNOR, J. We find no valid objection to the question asked Mr. Posey. It seems that at the time of the transaction had by him with Mr. Kinsey his employment in the suit with Emerson was at an end and the employment in the other suit had not commenced. However this may be, the communication was not in any legal sense in regard to the business or employment in respect to which the privilege may be invoked. We think the testimony of Mr. Posey comes neither within the letter or spirit of the law. Greenleaf Ev., Vol. I, page 380 (16 Ed.). We find no suggestion

that Mr. Posey was or had been Kinsey's attorney in regard to the purchase of the stock or the contract made respecting it. The exception must be overruled.

We see no objection to the course pursued by his Honor in asking the question of the witness. The reason assigned by him fully explains his action. It has been frequently said by this Court that Judges do not preside over the courts as moderators, but as essential and active factors or agencies in the due and orderly administration of justice. It is entirely proper, and sometimes necessary, that they ask questions of a witness so that the "truth, the whole truth, and nothing but the truth" be laid before the jury. The trial of causes must not be permitted to degenerate into a mere game of chance or trial of skill, the victory going not to him whose cause is just but to the most skillful player. Learned and just Judges are appointed to see that suitors have judgment accordingly as they have the right of the controversy. The exception to his Honor's question cannot be sustained.

There is no reversible error in his Honor's charge upon the first issue. If the jury found that by mutual consent of the plaintiff and the defendant's intestate the $500 deposited in the bank, to be forfeited if the plaintiff failed to comply with the contract, was withdrawn and the amount loaned to the defendant's intestate, we see no good reason why it was not a valid contract and enforcible against the defendant's intestate. It is unfortunate that the parties left the matter in so much uncertainty. One of them is dead, and by the law the lips of the other are sealed. In this condition of the matter the jury had nothing to guide them except the receipt and the testimony of Mr. Posey. The conclusion to be drawn from this evidence was for them.

We do not concur with his Honor's view upon the second issue. He charged the jury that if they believed the evi-

dence Kinsey did procure the stock and Eekhout failed to take it; that if the money had remained in the bank under the original agreement, or if a forfeiture to that amount continued to be a part of the stipulation, there was nothing due from the defendant to the plaintiff, but that if they mutually agreed to withdraw the money from the bank and that the forfeiture should no longer be a part of the stipulation, nothing would be due on the counter claim. We do not think the agreement to withdraw the money from the bank constituted conclusive evidence that the forfeiture should no longer be a part of the stipulation. It may well be that Kinsey, being in need of money, agreed to the withdrawal of the amount deposited upon condition that it be loaned to him, without releasing his rights under the contract. If the entire contract, with all the rights and liabilities accruing therefrom, was to be cancelled, it is strange that the stock was not withdrawn from the custody of the bank and returned to the shareholders. The giving of the receipt, instead of a note, indicates that the transaction was not closed. So far as appears upon the surface the $500 had been forfeited to Kinsey and he was entitled to demand and receive it. It may well be that he, to supply his immediate needs, consented to the withdrawal, leaving his rights under the contract open for adjustment. His Honor was of the opinion that if the agreement was "that the forfeiture should no longer be a part of the contract," then Kinsey had no other or further rights thereunder. We think he should have left the answer to the second issue to the jury to say whether, notwithstanding the agreement to withdraw the $500, the defendant was not entitled to recover of the plaintiff the damage sustained by the breach of the contract, and to fix the amount of such damage. He alleges that his intestate, at great expense and outlay of money, procured the stock and the plaintiff failed to take it in accord-

ance with his contract. We see no reason why he may not recover, by way of counter claim, such amount and other damages within the contemplation of the parties and proximately resulting from such breach of contract.

The evidence sent up is meager, and we can do no more than direct a new trial upon the second issue. It is so ordered.

New Trial.

WESTFELDT v. ADAMS.

(Filed May 27, 1904).

1. ACKNOWLEDGMENTS—*Deeds—Probate.*

Battle's Revisal, ch. 35, sec. 14, providing for the acknowledgment of deeds of married persons before probate judges, does not apply to deeds of unmarried men.

2. EJECTMENT—*Hearsay Evidence—Boundaries.*

It is not competent in an action of ejectment for a witness to state that his father pointed toward the land in question and said the reason he did not enter it was that it was covered by other grants, this being hearsay evidence.

3. WITNESSES—*Ejectment—Boundaries.*

The compensation received by a surveyor of land involved in ejectment is not such a disqualifying interest as to render proof of a declaration by the surveyor as to the boundary incompetent.

4. IMPEACHMENT OF WITNESSES — *Evidence — Corroboration of Witnesses—Supreme Court, Rule 27.*

The rule of the supreme court relieving the trial judge of the duty of instructing specially upon the nature of corroborative or impeaching evidence, unless specially requested, does not apply to a case where the trial judge in his charge marshals impeaching evidence along with substantive evidence without calling attention thereto.

WESTFELDT *v.* ADAMS.

ACTION by G. R. Westfeldt and others against W. S. Adams and others, heard by *Judge W. A. Hoke* and a jury, at Fall Term, 1903, of the Superior Court of HAYWOOD County. From a judgment for the plaintiffs, the defendants appealed.

F. A. Sondley and *J. C. Martin,* for the plaintiffs.

Shepherd & Shepherd, J. J. Hooker, Moore & Rollins and *Merrimon & Merrimon,* for the defendants.

MONTGOMERY, J. This case was before this Court at its August Term, 1902, and is reported in 131 N. C., 379. It is an action in the nature of ejectment. Several of the most important questions raised by the defendants' appeal on the former hearing and decided against him are before us again on the present appeal of the defendant. The plaintiffs, to make good their allegation of title to the land described in the complaint, introduced in evidence a grant from the State to E. H. Cunningham, dated April 28, 1860, and numbered 2,325; a duly certified copy of a proceeding in voluntary bankruptcy of Cunningham, and a deed from F. S. H. Reynolds, assignee of the estate of Cunningham, bankrupt, to George Westfeldt, dated April 24, 1869, registered in Swain County, September 16, 1881, for the land covered by the grant numbered 2,325. That deed was without a seal. In their answer the defendants denied that the plaintiffs were owners of the land, and in further defense they averred that if the grant from the State to Cunningham embraced the land described therein, yet that the defendants were the owners of two tracts of land of one hundred acres each situated within the boundaries of the land described in the grant of the State to Cunningham. That claim of the defendants rested, as they averred, upon two State grants, No. 1,545 and No. 1,546, of prior date to that of the grant to Cunning-

ham, to William R. and John McDowell, respectively. The defendants in their first appeal struck at the deed from Reynolds, the assignee in bankruptcy, to Westfeldt, contending that it was void because neither the official nor private seal of Reynolds was attached to his signature, and the same question is raised on the present appeal.

The Court in its former decision recognized the rule of law that a plaintiff might recover in an action of ejectment upon an equitable title, and also recognized the rule of practice that where it was necessary to establish equitable ownership by extrinsic testimony, the facts and circumstances should be particularly set out in the complaint. But the Court there held that in cases where the naked legal title was outstanding in another, or where, upon the face of the record evidence introduced on the trial, a court of competent jurisdiction would, in an *ex-parte* proceeding, and as a matter of course, order the correction of a mere formal defect in a deed. For instance, it is not necessary to set forth the particular facts constituting the equity in the proceedings, and the Court cited *Geer v. Geer*, 109 N. C., 679, on that point. The defendant did not except to that proposition of law or to that rule of practice, but contended then, and contends now, that the deed from Reynolds, the assignee in bankruptcy, to Westfeldt does not fall within the principle decided in *Geer v. Geer*. In the case as first reported we decided that it did, and we refer to the reasons for our decision to those given in the case as formerly reported. In addition, we will say that the proceedings in bankruptcy under the Act of 1867 were conducted through the several United States District Courts. The assignee, by virtue of his election or appointment, was vested with the title and right of possession of the property, real or personal, of a bankrupt. The assignee was also authorized by the law to make sale of the property of a bankrupt, the pro-

ceeds to be distributed among his creditors. Reynolds, the assignee, sold the land to Westfeldt, received the purchase-money and the same was distributed as by law required. In executing the deed to the purchaser the assignee omitted to affix his seal. Can there be a doubt that a Judge presiding over the Court under whose jurisdiction proceedings in bankruptcy were conducted would hesitate for a moment to order a commissioner to execute a deed to the purchaser, in cases where the assignee was dead or had discharged his duties and closed his trust? We think not. In the former appeal the defendant contended that the probate of the deed from Reynolds, assignee, to Westfeldt was fatally defective in that it was had before the Judge of Probate of Buncombe County, the land being situated in the county of Macon, afterwards in the new county of Swain (formed in 1871, Pub. Laws 1870-'71, chapter 94), and the signature of the Probate Judge not being attested by the seal of his office or by his private seal. The Court there held that neither at the time of the probate of the deed, May, 1869, nor when it was registered in Swain County on September 16, 1881, did the law require the certificate of the Probate Judge to be attested by the seal of the probate officer, and the Acts of 1868-'69, chapter 64, and Batt. Rev., chapter 35, section 5, were referred to. But the defendants now insist that the Court made a mistake in the former opinion in its citation of chapter 64 of the Acts of 1868-'69, and refer us to chapter 277 of the same session, ratified a month later than chapter 64. The defendant contends that the last-mentioned act, in full effect when the probate of the deed was had before the Judge of Probate of Buncombe County, required the official seal of that officer to be affixed to the probate. We knew at the time of the former decision in this case, as we know now, that chapter 277 of the Acts of 1868-'69, brought forward in

Battle's Revisal, chapter 35, section 14, referred to the probate of deeds only where the right, title and interests of married women were concerned and attempted to be conveyed. Those acts did not affect the deeds of unmarried men.

The defendants in undertaking to locate grants 1,545 and 1,546, under which they claimed, introduced many witnesses whose evidence tended to prove that the lands embraced in those grants were situated on Little Fork Ridge, and there was a contention between the plaintiffs and the defendants as to where Little Fork Ridge was—the defendants contending and introducing much evidence to show that it lay in the Smoky Mountains between Sugar Fork Creek and Haw Gap Creek, and that it occupied all the space between those two streams, running down to the water's edge on both sides and extending back in a northerly direction to and connecting with what is known as Jenkins' Trail Ridge. The defendants introduced evidence to show that a mountain oak, the beginning corner of one of their grants, stood upon this Little Fork Ridge as claimed by them. The plaintiffs introduced evidence tending to show that Little Fork Ridge was located two or three miles north-west of the ridge as it is located and claimed by the defendants, and that it divided Eagle Creek from Paw-paw Creek, and undertook to show that there was a mountain oak marked as a beginning corner on the ridge claimed by them to be Little Fork Ridge. To show that Little Fork Ridge was located where the defendants claimed it to be, his Honor allowed a witness for the defendants, Joel Crisp, to testify that when he was a boy, fourteen or fifteen years old, his father, who was dead at the time of the trial, told him while they were standing on the east side of Haw Gap Creek the names of the ridges, creeks and streams, and showed him the edge between Sugar Fork and Haw Gap

Creeks, and that his father said that ridge was Little Fork Ridge. The witness was then asked by the defendants if on that occasion his father had spoken to him of a tract of land called by the name of Hill or Munday land lying on Little Fork Ridge. The witness answered "Yes," and then in that connection the counsel for the defendants submitted to the Court in writing that they proposed to show by this witness that the father then pointed right in the direction of the land in controversy, and said: "The reason I did not enter those lands was that they were covered by older grants, the Hill or Munday lands, or the Hill and Munday lands," which one, the witness said he did not remember. The witness further said that the ridge to which his father pointed was about two and a half miles long, and the witness did not know which Hill his father referred to, nor where the lands were. Jonathan Hill, introduced by the defendants, had testified that the entries for the two tracts of land described in the defendants' grants had been made by Munday in his (Hill's) name, and that he, Hill, had no interest in them.

His Honor refused to allow the witness Crisp to testify to what his father had said when he was pointing toward Little Fork Ridge. It was proper in his Honor to admit the testimony of Crisp as to the location of Little Fork Ridge. It was most natural evidence for the defendants, because it bore directly on the question of the location of their grants, and because the plaintiffs had introduced evidence the tendency of which was to show that the land claimed by the defendants was away and out of the neighborhood of Little Fork Ridge as claimed by the defendants. But the attempt of the defendants to show the boundaries and the location of a tract of land by the hearsay evidence of a disinterested and deceased person, who had pointed in the direction of lands in the distance and said that the

reason he did not survey or enter those lands was because they had been entered by some one else, is altogether another matter. We are of the opinion that his Honor ruled correctly in holding that the evidence was incompetent and in refusing to receive it. The defendants, in their brief, insist that the evidence was as competent as that of Francks, who, on the former trial, was allowed to testify that his deceased father had told him about the beginning corner of a tract of land while they were twenty-five miles from the land, and although Francks, the witness, never identified the land afterwards. We do not see the similarity between the evidence of Francks (the subject of consideration in the former appeal) and that of the testimony offered on the part of the witness Crisp in the present appeal. Crisp's evidence was not offered to show *where a boundary line* was, or the *beginning point* of a tract of land, but to prove boundary or location by a pointing by one deceased in the direction of the land, the boundaries of which were in dispute. In the matter of Francks' testimony the evidence went to fixing the corner of the plaintiff's land. If in Francks' testimony he had said his father, who was dead and had no interest in the land, had told him on the spot that a certain point was the beginning point of a certain tract of land, there could have been no doubt, under all our decisions, of the competency of the evidence. But the conversation between Francks and his father about the beginning point of the tract of land in dispute occurred twenty-five miles away from the land; Francks never identified it himself. The Court said, there: "The particular witness Francks had never afterwards actually identified the boundary as fitting the description given by the deceased declarant. *Other* witnesses, however, testified that they found a tree at the alleged beginning corner answering the description given by the deceased to the first witness. If the beginning corner had

not afterwards been identified, then the testimony of Caber and Francks would have been inadmissible; because it was afterwards found we think it was competent." That ruling was going just as far as we thought the Court ought to go in reference to the competency of hearsay evidence on the question of boundary, and we are not disposed to carry it further.

There was an exception made, but not urged on the argument, that the declaration of McDowell, the surveyor, as to boundary was incompetent because he had received $50 as compensation for pointing out the beginning corner of the tract by the plaintiffs. The Judge held that the disqualifying interest must be an interest in the subject-matter of the controversy, and that the compensation the witness got as a surveyor in fixing the beginning point in the survey did not make the declaration incompetent. This ruling was correct.

There is one error, however, committed in the trial below, and which is pointed out in the appeal of the defendants, on account of which a new trial must be ordered. It was an error, however, more of inadvertence than a misapprehension of the law. The trial of the case consumed more than two weeks. One hundred and twenty-five witnesses were introduced and eleven days were taken up in hearing the evidence. Many perplexing questions of law were raised on the trial. The verdict was for the plaintiffs, and it was for them on the first trial, and we dislike to send this case back for a new trial. But under the law and our precedents it must be done.

The plaintiffs, to locate the land covered by their grants, introduced evidence tending to show that the beginning corner was at a single chestnut tree on the left-hand side of the Jenkins Trail, just above the Flint Spring. The defendant, to show that the single chestnut tree near the Flint

Spring was not the true beginning point of the plaintiffs' grant, introduced J. B. Crisp, who testified that he was a chain-bearer upon the survey made when the plaintiffs' grants were issued, and that the surveyors did not begin at the single chestnut tree ("H" on the map) as claimed by the plaintiffs, but at a chestnut marked on the map "Double Chestnut" about one mile north-east of the single chestnut, the point claimed by the plaintiffs as the beginning point. The plaintiffs then put in evidence an affidavit made by Crisp before the trial, in the following words: "Personally appeared before me, the undersigned justice of the peace, John Bennett Crisp, and maketh oath that the chestnut tree on the left-hand side of the trail leading from Flint Spring to Haw Gap in the Smoky Mountains is the beginning of four 640-acre tracts of land which he was chain-bearer for, which was surveyed for Daniel Lester; also to the place where a white-oak stood in the south boundary line of said two tracts." Crisp on cross-examination denied that he had made the affidavit, and denied that he had ever told anybody that the single chestnut tree, the beginning point as claimed by the plaintiffs, was the beginning point or the corner of said tracts, or that the white-oak was in the line of any of the tracts. A witness named Buchanan testified that he had heard John B. Crisp say the same thing as to the beginning corner of the land that was contained in the affidavit alleged to have been made by him. When Buchanan's evidence was received, his Honor told the jury that it was received by him and that they could only consider it as evidence for the purpose of contradicting Crisp; but when his Honor came on to instruct the jury as to the plaintiff's contention that their beginning corner was at the single chestnut just above the Flint Spring on the Jenkins Trail, in reciting the evidence for the plaintiffs in that contention he called the attention of the jury to the substantive evi-

dence of many witnesses, and amongst the number he mentioned the evidence of the witness Buchanan, without directing their attention to the evidence of this witness as being purely contradictory of that of Crisp and going to impeach his evidence-in-chief. After reciting what the other witnesses for the plaintiffs had said as to the beginning point of the plaintiff's land, his Honor went on to say: "A witness named Buchanan testified that he had heard John B. Crisp, a chain-bearer, say that the Westfeldt corner was just above Flint Spring, and he also spoke of a white-oak to the south as one of the Westfeldt corners. In not calling the attention of the jury, at that juncture of the trial, and in connection with the recital of the substantive evidence of the various witnesses of the plaintiffs as to the beginning corner, to the fact that the evidence of Buchanan was not substantive evidence on the subject of boundary, but only to impeach Crisp and to contradict his evidence, there was error. *Sprague v. Bond,* 113 N. C., 551; *Bullinger v. Marshall,* 70 N. C., 520; *State v. Parker,* 134 N. C., 209.

The Court, at this term, has amended rule 27 by adding at the end thereof: "When testimony is admitted, not as substantive evidence but in corroboration or contradiction, and that fact is stated by the Court when it is admitted, it will not be ground for exception that the Judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground for exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted." The amendment was made on March 16, 1904, and went into effect on that day. This case was tried at September Term, 1903, of the Superior Court of Haywood County,

but if the case had been tried after the amendment to rule 27 the error we have pointed out would not be cured thereby. The amendment would not apply to a case where the Judge below should instruct the jury at the time of the admission of the evidence that they should consider it only as corroborative, or for purposes of contradiction, if he afterwards in his charge should marshal that evidence along with the substantive evidence in the case. If he afterwards makes allusion to such evidence in his charge to the jury, he must again call attention to its nature.

For the error pointed out there must be a
New Trial.

CLARK, C. J., and WALKER, J., concur in result.

HARRILL v. RAILROAD CO.

(Filed May 27, 1904).

1. RAILROADS—*Partnership—Negligence—Questions for Jury.*

In an action against a railroad company for wrongfully causing the death of an engineer, the question whether it and another road were partners in operating the part of the road on which the deceased was killed was properly submitted to the jury.

2. RAILROADS—*Partnerships—Negligence—Contracts.*

A railroad corporation operating a road jointly with another corporation is responsible for injury to its employees, as a natural person would be for the liabilities of a firm of which he is a member.

3. CONTRIBUTORY NEGLIGENCE—*Assumption of Risk.*

In this action against a railroad company for wrongfully killing an engineer the instructions as to assumption of risk and contributory negligence are correct.

MONTGOMERY, J., dissenting.

HARRILL *v.* RAILROAD CO.

ACTION by R. N. Harrill against the South Carolina and Georgia Extension Railroad Company, heard by *Judge B. F. Long* and a jury, at September Term, 1901, of the Superior Court of RUTHERFORD County. From a judgment for the plaintiff the defendant appealed.

E. J. Justice and *Busbee & Busbee,* for the plaintiff.
P. J. Sinclair, G. W. S. Hart and *N. W. Hardin,* for the defendant.

CONNOR, J. The plaintiff alleged that his intestate, Jake Metcalf, was, on and before April 20, 1901, employed by the defendant as a locomotive engineer, and was on said day engaged in running an engine carrying cars from Blacksburg, S. C., to Marion, N. C. That while so engaged he was killed by the falling of a bridge or trestle, being a part of defendant's track over Buffalo Creek in South Carolina. That said trestle was on said day, by reason of defendant's negligence, in a defective and dangerous condition and by reason thereof gave way and fell, causing the death of his intestate. Defendant denied that plaintiff's intestate was on the day named employed by or engaged for the defendant in pulling a train from the points named in the complaint. The defendant also denied the allegation of negligence, and averred that plaintiff's intestate assumed the risk of crossing the trestle and was guilty of contributory negligence. At the conclusion of the plaintiff's testimony defendant moved for judgment of nonsuit for that: 1. The plaintiff has failed to show that the defendant company, the South Carolina and Georgia Extension Railroad Company of North Carolina, ran its train, built, or is required in law to maintain the trestle over Buffalo Creek in South Carolina, or that the plaintiff's intestate was employed by defendant company. 2. That there was no evidence of negligence on the part of

defendant. 3. That plaintiff's evidence demonstrated that his intestate was not without fault, and that he came to his death by his own negligence. The motion was refused and was renewed, upon the same grounds, at the conclusion of the entire testimony, and again refused and defendant excepted.

The Court submitted the following issues to the jury: 1. "Was plaintiff's intestate employed and sent by defendant on April 20, 1901, as engineer for the purpose of running an engine and cars attached from Blacksburg, S. C., to Marion, N. C., over Buffalo Creek trestle, as alleged in the complaint?" 2. "Was intestate killed by the wrongful act and negligence of defendant, as alleged?" 3. "Did intestate, by his own negligence, contribute to his death?" 4. "What damage, if any, is plaintiff entitled to recover?"

The controversy in regard to the relation which the plaintiff's intestate bore to the defendant company is presented by the first ground assigned for the motion to nonsuit, and certain special prayers for instruction asked by defendant. An examination and settlement of this question lies at the threshold of the case. If the plaintiff has introduced no evidence to sustain the allegation that his intestate was in the employment of the defendant company, and that by the terms of such employment he was required to run his engine over and across Buffalo Creek on the day he was killed, the motion for nonsuit should have been allowed. The testimony in regard to the status of the defendant and its relation to the South Carolina corporation owning the railroad to the North Carolina line is certainly unsatisfactory. To correctly understand the status of the defendant corporation it becomes necessary to state, as concisely as possible, its history and relation to certain other corporations. The General Assembly of this State, at its session of 1887, chapter 77, consolidated the Charleston, Cincinnati and Chicago

Railroad Company, a South Carolina corporation, with two North Carolina corporations, creating the C., C. & C. Ry. Co., a North Carolina as well as a South Carolina corporation, operating a railroad from Marion, N. C., to Blacksburg, S. C. This railroad, with all of its property rights, franchises, etc., in both States, was sold under foreclosure proceedings in the Circuit Court of the United States, and was, by the purchaser, incorporated under the corporate name of O. R. & C. Ry. Co. *Bradley v. Railroad,* 119 N. C., 918, Appendix.

This last-named corporation executed certain mortgages which were foreclosed pursuant to a decree of the Circuit Court of the United States for the Western District of North Carolina, and the property rights, franchises, etc., purchased by Samuel Hunt and others. Pursuant to sections 697, 698 and 2005 of The Code, the purchasers formed a new corporation under the name of the South Carolina and Georgia Extension Railroad Company of North Carolina. At the session of the General Assembly of 1899, Public Laws, chapter 35, the Legislature incorporated said company under said name, conferring upon it all of the rights, powers and privileges, franchises and immunities that at any time belonged to the Charleston, Cincinnati and Chicago Railroad Company, or to the Ohio and Charleston Railway Company of North Carolina, or to the Ohio River and Charleston Railroad Company, or to any or all of their predecessors. The said corporation was authorized to operate and maintain a railroad from the said line on the county line of Cleveland County to the town of Marion in the State of North Carolina, and was authorized and empowered to assign or lease its franchises, rights and property and to consolidate with any other corporation organized under the laws of this or any other State. The manner in which said consolidation shall be made, and the evidence thereof, is fully

set forth in section 8 of chapter 35 of said act, which was ratified January 31, 1899. On the 18th of August, 1898, the South Carolina and Georgia Extension Railroad Company of South Carolina was chartered, which charter was confirmed by the Legislature of South Carolina on the first day of March, 1899. The same persons, except P. J. Sinclair, are named as directors of the South Carolina corporation. The Constitution of South Carolina forbids any foreign corporation to do business there without the consent of the Legislature of that State. There was no evidence that said corporation had consolidated in accordance with the provisions of section 8, chapter 35, of the Laws of 1899. There was no other line of road running from Marion, N. C., through Rutherford and Cleveland counties to the South Carolina line than the one which extends to South Carolina and across to Blacksburg. It appeared in evidence that the intestate was employed by the *South Carolina and Georgia Extension Railway Company.* This was shown by vouchers and checks issued to the said intestate drawn upon the National Union Bank, Rock Hill, S. C., The National Bank of Gaffney, Gaffney, S. C., Merchants and Planters Bank, Gaffney, S. C., or B. Blanton & Co., Bankers, Shelby, N. C. There was also evidence tending to show that the run of said intestate was from Blacksburg, S. C., to Marion, N. C., and return; that he had been making this run for about two years; that he was working for the same company during this time. His widow testified that he was working on the road which operated trains in North Carolina from Marion along the line of what is known as the "Three C road"; that he had the rule book and time tables issued by the South Carolina and Georgia Extension Railroad Company. It was in evidence on the part of the defendant that Thomas A. Smith was a section-master, having under his charge a portion of the road running from Blacksburg,

S. C., to Earle, N. C. It was further in evidence on the part of said witness that he had been section-master of said road eight or ten years; that three miles of his section was in North Carolina and three in South Carolina, including Buffalo Creek; that it was under one management and that he was employed by one company; that his employment covered the time of death of plaintiff's intestate. Another witness for the defendant testified that he was employed on said road and did not know he was working for but one company. It was further in evidence by W. M. Wilkie that on the 20th day of April, 1901, he was employed in repairing cars in the shop at Blacksburg for the South Carolina and Georgia Extension Railroad Company; that he had worked on trestles from Blacksburg, S. C., to Brushy Creek, N. C.; that Mr. Tripp was superintendent, Mr. Maxwell was supervisor of the track, Mr. Nutting was supervisor of the bridges and trestles. There was no evidence of the existence of any corporation by the name of the Georgia and South Carolina Extension Railroad Company.

The defendant denies "on information and belief" many of the allegations of the complaint in respect to the relation the plaintiff's intestate bore to the corporation. For instance, the fifth allegation of the complaint is, "That on the morning of April 20, 1901, the said intestate was sent out by defendant from Blacksburg, S. C., on his regular run with a train consisting of engine and tender, freight cars and passenger coach, as plaintiff is informed and believes." The answer is, "It denies on information and belief the statement of facts in the fifth paragraph of the complaint." It is very doubtful whether this answer to this very material allegation raised an issue. The Code, section 243, requires the answer to either deny each allegation or "any knowledge or information thereof sufficient to form a belief." However this may be, no question was raised in regard to it by the

plaintiff, and we notice it only as indicating the trend of the defendant's answer to the vital question as to its relation to the employment of the plaintiff's intestate. The entire testimony presents the very singular and anomalous spectacle of a railroad track, originally built and belonging to a corporation chartered by the General Assembly of two States, running and operating in both States a continuous line, being sold and the purchasers incorporating two companies of the same name, except that one is "of South Carolina" and the other "of North Carolina." The two roads are operated by persons who adopt the name of "The South Carolina and Georgia Extension Railroad Company." There is no evidence of any consolidation of the two corporations, or of any lease of the track of one company to the other. The two roads are operated by a common set of officers, the section assigned to one of the section-masters being one-half in each of said States. One superintendent, one inspector of cars, and, in general, one set of employees. The checks given to the plaintiff's intestate indicate that the road is operated from a common treasury. There is other testimony to the same effect. There is no more evidence that the plaintiff's intestate was employed by the South Carolina than by the North Carolina corporation. If the defendant's contention be sustained, we have the anomalous condition of employees operating a railroad with no responsible head, and no one responsible for injuries sustained by them, and no one responsible to the public for breach of contracts. There must be some explanation of this condition. The plaintiff served notice upon the defendant "to produce in a legal form, showing that it would be competent testimony, the charter of the South Carolina and Georgia Extension Railroad Company, and states that it is alleged by the plaintiff that there is no such legal charter and that there was an attempt at consolidation of the South Carolina and Geor-

gia Extension Railroad Company of South Carolina and the South Carolina and Georgia Extension Railroad Company of North Carolina, which did not have the effect of extinguishing the two former corporations and creating a new one, but which made a partnership of the two former, which did business under the name and style of the South Carolina and Georgia Extension Railroad Company, it being a partnership and not a corporation." There was no response to this demand. There is but one possible theory upon which the operation of these roads in the manner testified to by the witnesses for both plaintiff and defendant can be explained. The plaintiff contends that there was testimony competent to be submitted to the jury tending to show that the two corporations were running and operating said roads under an arrangement or agreement which, in law, constituted them partners under the name of the South Carolina and Georgia Extension Railroad Company, and asked his Honor to submit this question to the jury, the defendant objecting for that there was no evidence to sustain such instruction. His Honor having refused the motion for nonsuit and submitted the question to the jury, the exception to his refusal and instruction to the jury raises the question whether there was any evidence to sustain it. Among other instructions, his Honor said to the jury: "There is some evidence tending to show the corporation which is sued, and which was chartered by the Legislature of North Carolina, operated a railroad in North Carolina in 1899, 1900 and 1901, and that trains operated over this road at that time passed into South Carolina and over Buffalo Creek daily. Mrs. Metcalf testified, as the Court recalls, that her husband was employed by the company so operating the trains in this State, and that he was required as such employee in the performance of his duty to go on to Blacksburg and over this trestle. If you find from any evidence in this case

that the plaintiff's intestate was employed by the defendant and was required to go over the trestle at Buffalo Creek, in South Carolina, you will answer the first issue 'Yes.'" The defendant excepted to this instruction. "The jury will answer the first issue 'Yes' if they find from the greater weight of the evidence that the South Carolina and Georgia Extension Railroad Company of North Carolina and the South Carolina and Georgia Extension Railroad of South Carolina, under the name and style of the South Carolina and Georgia Extension Railroad Company, jointly or by mutual consent employed plaintiff's intestate and made it his duty as an engineer to run from Marion, N. C., to Blacksburg, S. C., on April 20, 1901, and operated trains over the railroad leading from Marion to Blacksburg as one company, with a common set of officers and a common treasurer, when the said South Carolina and Georgia Extension Railroad Company had not been incorporated according to law, and there had been no legal consolidation of the said two companies."

It is held by this Court in *Rocky Mount Mills v. Railroad Co.*, 119 N. C., 693, 56 Am. St. Rep., 682, that where two or more connecting roads have agreed among themselves to conduct business through their systems under the name adopted by them, and have so advertised to the public, and have so contracted with persons, that each road which is a party to such agreement is liable for the negligence of the other roads. In that case it appeared that certain connecting roads had entered into an agreement to receive and transmit freight under a through bill of lading, that they adopted the name and style of the "Atlantic Coast Dispatch," and issued bills of lading in that name. For the failure to promptly carry and deliver freight it was held that either of the roads to such agreement might be sued for damages. The Court, after discussing the question, says:

"Upon examination and reflection we are of the opinion that the defendants and their connecting lines are jointly liable, each for the others, on the contract before us, and that they are also entitled to the same immunity and privileges as if the contract had been made by the individual company sought to be charged under said contract, that is to say, that they are engaged in business as partners under the name of the 'Atlantic Coast Dispatch.' They are still common carriers, none the less so because they have certain stipulations. Having jointly agreed to conduct the 'All-Rail Fast Freight Line' business under the name above stated between the terminal points of their connections North and South, and having so informed the public and so contracted with the plaintiff, their true character is fixed by the law according to the nature of their business, and such character cannot be thrown aside by any declaration in the contract in relation to the consequences of liabilities attaching thereto." The Court again says: "Taking notice, as we are at liberty to do, that the numerous transportation lines in our country, connecting with each other, constituting continuous lines between localities, are important factors in the commercial life of the country, we can readily see that if the shipper should have to go to a distant State and find as best he can the negligent party and enforce his remedy against him there, then the expense and trouble would in many cases be ruinous. On the contrary, the carrier's remedy in a case like the present would be easy and speedy. The whole matter is this: The defendants and their associates have engaged in a public business in the manner described for mutual benefit and convenience, and attempted to avoid the legal consequences by adopting some fancy name and by stipulating for limitations on the liabilities incurred in the exercise of their privileges in such business."

It would seem clear that if two natural persons were found

using their common property jointly, permitting those in the active control and management of it to make contracts, collect moneys for its use and hold themselves out to the public as authorized to so use it, the question as to whether such use was the result of some agreement or partnership would be submitted to a jury. It is difficult to conceive that the president and directors of the two corporations would so far abdicate their powers and fail to perform their duties in respect to the property and franchises as to permit strangers without authority to assume control of it, employ servants and agents to operate it, assume responsible duties to the public, and, in short, to do all such things in respect to the property as the corporations were authorized to do. This will be the condition with which we are confronted unless those who under the name and style of the South Carolina and Georgia Extension Railroad Company have leased this property from the corporations, or are operating it as their property. In view of the entire evidence, we think that his Honor properly submitted the question to the jury. It is well known as a part of the history of this country that railroad companies do form traffic and passenger arrangements and otherwise operate their property jointly for their common benefit. Usually this is done by virtue of special permission granted by the Legislatures of the different States. If it be done without such authority, and is *ultra vires* as between the corporations and the public, they could not escape liability to persons with whom they had formed contractual relations by reason thereof. It does not appear that the South Carolina and Georgia Extension Railroad Company is a legal entity or consists of anything more than a corps of superintendents, section-masters, engineers and other persons employed in operating a railroad. Surely such a mythical personality may not stand to the front and prevent the Court laying hold upon the real owners of the property

and, as the jury have found, real operators thereof, and fixing them with liability for breach of contracts. It would be but keeping the promise to the ear and breaking it to the hope to say to this engineer or his personal representative that the South Carolina and Georgia Extension Railroad Company is alone responsible for a defective condition of the bridge by which he lost his life. Questions somewhat analagous to this have come before the Court, and it has been uniformly held that the jury is the proper tribunal to pass upon and ascertain the real facts and fix real responsibility. In the case of *Muschamp v. Railroad Co.*, 8 M. & W., 421, the question was presented as to the liability of the defendant for loss of articles shipped over its own and other lines. *Lord Abinger, C. J.*, said: "The whole matter is therefore a question for the jury to determine what the contract was on the evidence before them." In *Bradford v. Railroad Co.*, 7 Rich. L., 201, 62 Am. Dec., 411, the Court held that in such cases it was a question for the jury to determine. In *Hart v. Railroad*, 8 N. Y., 37, 59 Am. Dec., 447, the Court said: "I am satisfied from this evidence that the refusal of the Judge to nonsuit the plaintiff was right. The Court charged the jury that it was for them to say whether it was proved that the defendant by its agents received the baggage and agreed to carry it to Troy, and on the decision of the motion for a nonsuit, after all the evidence was given, the Court stated it was a matter to be left to the jury. The Court was right, both in the charge and in the refusal to nonsuit. There were facts which it was proper to submit to the jury, who were the proper judges of the weight of evidence, and it would have been error to have refused so to submit them."

We think that his Honor's ruling in the matter was correct. The jury having found, under the instructions, that the defendant corporation was, together with the South Car-

olina corporation, operating the road jointly, of course it becomes responsible for the injury sustained by its employee in the same manner that a natural person would for the liabilities of a partnership of which he was a member. We have carefully examined his Honor's charge upon the second issue and find no error therein.

The principal contention is made upon the question of "assumption of risk" and contributory negligence. In respect thereto it is conceded that the law of South Carolina prevails. Mr. D. W. Robinson, a practicing attorney, residing in South Carolina, was examined as a witness in regard to the law of that State, and after testifying in regard to Article VIII, section 9, of the Constitution, was asked the following question: "If the jury should find that the engineer of a locomotive engine employed by a railroad company, while running a train across a trestle on the road of said company in the discharge of his duty as such employee, had lost his life by the trestle giving way on account of some defect in the trestle, and the engine falling through by the breaking down of the said trestle; would this, under the laws of South Carolina, render the railroad company liable in an action by the personal representative of deceased for damages for such death?" Ans. "Yes, sir." "Under the laws of South Carolina, would the defense by a railroad company to an action for damages by reason of the falling in of a trestle along the railroad track and the consequent death of the engineer, that the engineer knew of the dangerous condition of the trestle or had opportunity to know it, avail the railroad company anything? If not, why not?" Ans. "I do not think the defense of knowledge and assumption of risk in a case of this kind would avail the defendant, because the provision of the Constitution of South Carolina, Article IX, section 15, makes this defense of no avail, and this seems to be the construction placed upon this provision

by the courts of South Carolina." (The witness thereupon cites a number of cases decided by the Supreme Court of that State and proceeds to say): "But if this case is not covered by the provision of the Constitution which I have above quoted, then the law applicable to it, as construed in this State, is that the question whether or not the party is to be deemed to have assumed the risk from knowledge of the dangerous or defective character of the appliances, machinery, etc., which he uses, is a question for the jury. The cases already cited cover this doctrine." The witness was examined fully in regard to the law of South Carolina, and upon cross-examination said: "Any degree of contributory negligence, as this term is used by the Supreme Court of South Carolina, and properly understood, will defeat a recovery. The meaning of contributory negligence, as defined by the Supreme Court of South Carolina, is that kind of negligence of the plaintiff which is a direct and proximate cause of the injury combining and concurring with the defendant's negligence in the same matter causing the injury. Unless it is the direct and proximate cause, it is not contributory negligence within the meaning of the term used by the Supreme Court of South Carolina. The distinctions and doctrines applicable to a proper understanding of contributory negligence will be found in *Bodie v. Railroad* (S. C.), 39 S. E., 715, above referred to." His Honor read to the jury the constitutional provision and said: "If this trestle was dangerous in its construction, or in any other manner, as alleged in the complaint, and if the defendant company knew this and required and permitted its engineers in the performance of the duties of their employment to pass over it, then I charge you that such engineers would not be barred of their recovery in case of injury to them because they knew the trestle was thus defective." We think there was evidence to sustain this instruction. In regard to

the issue of contributory negligence, his Honor charged the jury as follows: "Contributory negligence in South Carolina does not apply to the use by an employee of a railroad company of defective ways of such company when the railroad company knew the ways were defective, and the employee was required by it to use such ways in the performance of his duty, and when there is but one manner or method of using the same, and the employee is injured in so using it. An employee of a railroad company cannot hold his employer liable for his wrongful acts done, not in obedience to his duty as such employee, but contrary to it. The Constitution of South Carolina does not go this far. It is not to be assumed that a man in his senses will heedlessly imperil his own life. Culpable negligence of the plaintiff's intestate, properly so-called, which contributed to the injury, must always defeat the action. But the nature of the primary wrong has much to do with the judgment, whether or not the contributive fault was of a negative character, such as a lack of vigilance, and was itself caused by or would not have existed but for the primary wrong. It is not in law to be charged to the injured one but to the original wrongdoer. See *Kirley v. Railroad,* S. E. Rep., June 24, 1902, page 774. If the jury finds that when the intestate, Jake Metcalf, on the morning of April 20, 1901, arrived at Buffalo trestle and was waved down by Tom Smith, the section-master, and they went together out on the trestle and Smith pointed out to Metcalf that the track of the railroad was out of order and the trestle was dangerous and unsafe waved him not to go over it, and told the intestate that the trestle was unsafe, or if it was apparently more unsafe and more likely to fall than usual, and this could have been detected by ordinary prudence, and Jake Metcalf did not exercise such prudence, and was thereby injured as the direct result thereof, you will answer the third issue 'Yes'; or if

he willfully killed himself, you will answer the third issue 'Yes.' You will answer the third issue 'No' if you find from the evidence that when Jake Metcalf arrived at the trestle over Buffalo Creek on the morning of April 20, 1901, he was flagged down by Tom Smith, the section-master, and told that the creek was high and that he wanted Metcalf to get out and examine the trestle, and he did so, and walked out on the trestle with Smith, and the track appeared to be in alignment and surface, and there was nothing the matter with the track or trestle so far as appeared from examination except the water was high and came up on the trestle as high as is represented by the red line on the picture (Exhibit 3), and that there was a raft above the trestle and that there was nothing further unusual about the track or trestle, and that Metcalf was left by Tom Smith to rely on his own judgment as to whether he should go on the trestle and was not warned not to go, and Metcalf believed he could go over it with as much safety as for some months before, and a man of ordinary prudence under like circumstances would have ordinarily so believed, and that Metcalf violated no rule or order of his employer in going on or over the trestle." Defendant excepted to the giving of these instructions.

We think there is no error in the instructions as given. The defendant asked for a number of special instructions, the larger part of which were given with certain modifications, which we have carefully examined, and which we think were correctly made. This case is before this Court for the second time and was argued at the last term. We have given it a careful and anxious consideration. It was argued with marked ability by eminent counsel on both sides. It is not for us to say what the verdict of the jury should have been, we can only pass upon the exceptions to

his Honor's rulings upon questions of law, and as to them, for the reasons hereinbefore given, we find

No Error

MONTGOMERY, J., dissenting. The plaintiff brought this action to recover damages for the killing of his intestate through the alleged negligence of the defendant company. In the complaint it is alleged that the defendant is a domestic railroad corporation in North Carolina, and that the line of its road extends through Blacksburg, South Carolina, through Cleveland and Rutherford counties in North Carolina, to Marion, North Carolina; that his intestate at the time of his death was employed by the defendant as a locomotive engineer and was engaged in running an engine pulling a train from Blacksburg, S. C., to Marion, N. C.; that the defendant, in the exericse of due care, undertook to cross a high trestle over Buffalo Creek in South Carolina between Blacksburg and the North Carolina line and was killed by the falling in of part of the trestle, the trestle having been insecurely built and then in a bad condition to the defendant's knowledge. The allegation of the complaint is that the trestle over Buffalo Creek where the intestate lost his life is in South Carolina, and all of the evidence was to the effect that it was on the railroad track of the company organized and chartered in South Carolina as the "South Carolina and Georgia Extension Railroad Company of South Carolina." The act of incorporation of the defendant company, passed on the first day of February, 1900, chapter 35 of the acts of the General Assembly of 1899, shows that the defendant corporation was authorized to operate and maintain a railroad from the State line between the States of North Carolina and South Carolina, on the county line of Cleveland County, to the town of Marion in the State of North Carolina, and thence to the Tennessee State line.

It was admitted by both sides on the trial, and the admission was correct in law, that there is a presumption of law, in the absence of proof, where a corporation has authority to operate a railroad and the road is being operated, that the company authorized by the charter is in fact conducting its management, and the Court so instructed the jury. The plaintiff's intestate, then, having been killed in South Carolina on the road of the South Carolina and Georgia Railroad Company of South Carolina there is a presumption of the law that that company was operating its own road.

The defendant at the close of all the evidence renewed its motion to nonsuit the plaintiff upon the ground that the plaintiff had failed to show that the defendant company, the South Carolina and Georgia Extension Railroad Company of North Carolina, ran its train, built, or was in law required to maintain the trestle spanning Buffalo Creek in South Carolina, or that the plaintiff's intestate was employed by the defendant company. We think that the motion should have been allowed.

The first issue was as follows: "Was the plaintiff's intestate, Jake Metcalf, employed and sent by the defendant, on April 20, 1901, as engineer for the purpose of running an engine and cars attached from Blacksburg, South Carolina, to Marion, North Carolina, over Buffalo Creek trestle, as alleged in the complaint?"

After a careful scrutiny of all the evidence in this case, I find none to the effect that the intestate was either employed by the defendant company or that he was under its direction or orders on the 20th April, 1901—the day of his death. The only evidence offered by the plaintiff to prove that fact positively was the testimony of Mrs. Corrie Metcalf, the widow of the intestate. In her examination-in-chief she said that the intestate's "run" was from Blacksburg to Marion and return; that he had been working for the same company

all the time he was on that "run," and that the road on which he, as engineer, hauled trains was in North Carolina from Marion along the line of what was known as the "Three C road." On her cross-examination, however, she said that the name of the company that runs to Marion is the same as that company that runs to Camden, and that, of her own knowledge, she did not know what that name was—she only knew that their literature (referring to order book and the checks in which the intestate received his monthly wages) said it was. The checks and order book were shown in evidence. The checks were drawn at Blacksburg, S. C., by A Tripp, superintendent, and at the top of it was printed "South Carolina and Georgia Extension Railroad Company. Pay Roll No. 2."

The order book which was delivered to the intestate contained, as prefatory to the rules, the following printed statement: "No. 555. This book is the property of the South Carolina and Georgia Extension Railroad Company and is loaned to J. D. Metcalf, engineer, who hereby agrees to return it to the proper officer when called for, or upon leaving the service." He signed it. The evidence of that witness did not tend to show that the intestate was employed by the defendant company.

E. F. Dougherty, a witness for the defendant, on the other hand testified that at the time of the intestate's death he was train dispatcher of the South Carolina and Georgia Extension Railroad Company, and that the intestate on the day of his death was sent out by him from Blacksburg to Marion in charge of an engine and train; that he had never been employed or paid by the defendant company. There was a contention on the part of the plaintiff, both in this Court and in the Court below, that the defendant company and the South Carolina and Georgia Extension Railroad of South Carolina were either partners or joint operators of

the two corporations, using the name of the South Carolina and Georgia Extension Railroad Company as the name under which they operated their partnership or joint interest business; and his Honor submitted that view to the jury upon the following instruction: "The charter of the defendant company, ratified on February 1, 1899, Acts 1899, page 129, provides that it may consolidate with any other company in this State or any other State, and it provides further how such consolidation shall be effected, and that the consolidated company shall be a legal corporation when certain papers mentioned in the charter should be filed with the Secretary of State. If the jury find from the evidence that these two corporations were doing business over the line of road in North Carolina and South Carolina under the name of South Carolina and Georgia Extension Railroad Company, and there was no such corporation as this last named concern, but that it was a combination of the two corporations operated under a common set of officers and from a common treasury, then the South Carolina Georgia Extension Railroad Company of North Carolina would be liable for torts as a joint operator of the property under the name and style of the South Carolina and Georgia Extension Railroad Company."

The evidence on which that contention was submitted to the jury was that trains of cars ran daily from Blacksburg to Marion and returned; the testimony of Dougherty, who said that he was the train dispatcher of the South Carolina and Georgia Extension Railroad Company; that A. Tripp was the superintendent of the same road; that Nutting was supervisor of bridges and building; that Maxwell was supervisor of roadway; that they all lived in Blacksburg, S. C.; that the South Carolina and Georgia Extension Railroad Company ran from Marion to Camden, and that he did not know of any different company that ran from Marion to

Blacksburg. The fact, too, that the act of Assembly incorporating the defendant company in North Carolina, and that of the South Carolina Legislature incorporating the South Carolina and Georgia Extension Railroad Company of South Carolina, with the same corporators in both, authorized each of the companies to lease, or lease to, or consolidate with, any other railroad company, and the fact that no such lease or consolidation had been made or effected, were relied upon to give color and force to the contention that, instead of a consolidation between the two companies, they had agreed upon a joint management of the business of the two roads and a division of the profits.

I cannot see how that evidence tends to prove the contention. If there had been no consolidation in law of the two companies, and there is no evidence that there had been, and the name of the South Carolina and Georgia Extension Railroad Company is a myth, the evidence tends rather to show that the South Carolina and Georgia Extension Railroad Company of South Carolina is the real power which is operating the defendant road, for the officers who control it live in South Carolina on its line of railway, and its trains start from Blacksburg and return the same day, and the defendant company has no cars or engines. To me it seems that the defendant company has no part in the actual management of its road, and if it is interested in the profits there is no evidence of it.

I think there ought to be a new trial.

HOOD v. TELEGRAPH CO.

(Filed May 27, 1904).

1. NONSUIT—*Dismissal—Judgment—Actions—Limitations of Actions.*

Where a nonsuit is granted upon a demurrer to the evidence, a new action may be brought within one year.

2. TELEGRAPHS — *Negligence — Free Delivery Limits — Mental Anguish—Damages.*

Where a telegraph company failed to make any attempt to deliver a message because the sendee lived beyond the free delivery limits and also failed to notify the sender of additional charges for such delivery, or of refusal to deliver it at all, the company is liable for damages resulting from its negligence in failing to make the delivery.

ACTION by S. L. Hood and wife against the Western Union Telegraph Company, heard by *Judge T. A. McNeill* at March Term, 1904, of the Superior Court of MECKLENBURG County. From a judgment for the defendant the plaintiffs appealed.

Maxwell & Keerans, for the plaintiffs.
F. H. Busbee & Son, for the defendant.

CLARK, C. J. The evidence is that the male plaintiff, at the request of the *feme* plaintiff, his wife, and for her use and benefit, delivered to the telegraph operator in Charlotte at 7 A. M. April, 1900, the following prepaid message to be transmitted to Concord, N. C., to W. M. Petrea, the father of the *feme* plaintiff: "Come at once. Baby is sick." The child was very ill, and the object of the message was that the *feme* plaintiff's father and mother might come to Charlotte to comfort and assist her. The telegraph operator

was told that the child was very ill and that the message should be sent at once, and he promised that it should be. The sendee lived seven or eight miles from Concord, but was well known at that place. It was the first message ever sent by the plaintiffs and they knew nothing about free delivery limits, and, this being the nearest telegraph station to the sendee, supposed the message would be delivered. The operator, neither at Charlotte nor Concord, made any objection, nor informed the plaintiff of any hesitancy or difficulty in delivering, and the plaintiffs supposing the message had been delivered expected and looked for the arrival of the plaintiff's mother and father till midnight. The child died at 4 o'clock that afternoon. If the defendant had advised the senders that an additional sum would be required before delivery it would have been paid; or if advised promptly that the defendant would not deliver it at all, the plaintiffs would have made other arrangements to notify Petrea and wife, and that Petrea and wife would have come to Charlotte that day if he had received the message, and would have paid any extra charges demanded if the telegram had been delivered to him. Such is the substance of the evidence.

It was further in evidence that it was the general custom of the telegraph company at Concord *either* to allow its messenger boys to deliver messages out in the country and collect from sendees, *or* to wire back to the sending office the additional charges for such delivery and to advise the sender what such charges would be. The evidence is that if either course had been pursued the sender and the sendee (as the case might be) would have paid the charges. It was also in evidence that the office in Concord frequently did deliver or allowed its messenger boys to deliver messages out in the country, outside of Concord, without charges being prepaid when they thought the sendee would pay the charges.

and when in doubt about this the Concord operator always advised the sending office that the sender should be notified what such charges would be; that the Concord office had frequently sent such messages out in the country by N. J. Corl, a liveryman, and he had often collected the extra charge without prepayment being guaranteed; that if the message had been handed to Corl he would have delivered it to Petrea without prepayment being guaranteed by the defendant; that a similar custom of delivery outside of free delivery limits also prevailed in Charlotte; that the plaintiffs had lived in Charlotte two years prior to sending this message, their mail being delivered daily by the post-office carrier; that the messenger boy in Charlotte on duty that day knew where the plaintiffs resided, but the defendant made no inquiry of him nor made any effort to notify the plaintiffs of the non-delivery of the message, nor of any doubt or hesitation as to delivering it to the sendee; that they had no relatives in Charlotte to assist them in preparing their child (who was their eldest and only child) for burial, and deciding to carry the body to the *feme* plaintiff's father's home for burial on the next morning (Monday), at 7 A. M., the male plaintiff at the request of and for the use and benefit of his wife, the female plaintiff, delivered the following prepaid message directed to James Dry at Concord: "Tell Mr. Petrea to meet corpse on train No. 36. Have some one to dig grave"; that this message was sent in order that the plaintiffs *might be met by some one in Concord* on the arrival of said train, either by Petrea or some one else, so that the male plaintiff might not have to leave his wife with the corpse and go out to procure a team to carry them into the country; that when he prepaid the message the husband of the *feme* plaintiff told the operator in Charlotte where Dry resided in Concord, and the operator promised to forward the message at once; that relying on such

promise they went to Concord with the child's body on train No. 36, but no one met them on arrival; that the male plaintiff had to leave his wife with a relative and go out to procure a conveyance; that the train arrived at Concord at 11 A. M. but the message was not delivered to Dry till 10 A. M. (three hours after its delivery to the defendant's agent in Charlotte), being too late for him to notify Petrea in time for the latter to have some one to meet the plaintiffs on arrival of the train, which he would have done if the message had been delivered promptly to James Dry, who would at once have sent it to Petrea, and could have done so in an hour, and that it could have been delivered to Dry in twenty minutes after its receipt at the Concord office; that when Petrea got the message the conveyance was started off in a few minutes to meet the plaintiffs, but too late; that on Monday, after the second message was delivered to the defendant, the plaintiffs, in reply to their inquiry, were for the first time informed that the prior message had not been delivered because Petrea lived seven miles in the country, and a postal card had been put in the post-office to advise him, but no such card was ever delivered; that the *feme* plaintiff suffered much grief by the failure of her mother and father to come to Charlotte on Sunday's train, as they would have done if the telegram had been delivered according to the defendant's custom, or if non-delivery had been at once notified to the plaintiffs, so that they could (as they would) have secured delivery by other means, and also by the failure to meet her at the train on the arrival of the body, and her husband under those circumstances having to leave her to go out to procure a conveyance.

There was no evidence offered by the defendant. It was error to nonsuit the plaintiffs upon this testimony. It is clear, beyond controversy, that the defendant was guilty of very great negligence, and no one of the slightest sensibility

will deny that the probable result would be, and was, needless grief and mental suffering in consequence inflicted thereby upon the *feme* plaintiff. What would be a just compensation, if any, is a matter which can be settled only by a jury, whose verdict if excessive is subject to the power of the Court to be set aside. It may be that the defendant's evidence may establish a different state of facts materially mitigating the plaintiffs' *prima facie* case or defeating it entirely. But the legal propositions involved, establishing a *prima facie* right in the *feme* plaintiff to recover, are so clearly settled as to require no discussion. Among the cases exactly in point is *Hendricks v. Telegraph Co.*, 126 N. C., 311, 78 Am. St. Rep., 658, in which it is said: "We think it is the duty of the company in all cases where it is practicable to do so to promptly inform the sender of a message that it cannot be delivered. While its failure to do so may not be negligence *per se*, it is clear evidence of negligence. In many instances by such a course the damage could be greatly lessened, if not entirely avoided; a better address might be given, mutual friends might be communicated with or even a letter might reach the addressee. In any event, the sender might be relieved from great anxiety and would know what to expect. Moreover, it would tend to show diligence on the part of the company." This language is approved in *Laudie v. Telegraph Co.*, 126 N. C., 431, 78 Am. St. Rep., 668; *Hinson v. Telegraph Co.*, 132 N. C., 467.

"It may be further noted that the company does not say that the message will not be delivered beyond such limits, but that a special charge will be made to cover the cost of delivery, which seems to clearly imply that it would be delivered. No fixed limit of distance nor definite sum is specified, and it is difficult to say how the sender can be presumed to know either in the absence of information from

the company." *Hendricks v. Telegraph Co., supra: Bryan v. Telegraph Co.,* 133 N. C., 605.

"The failure of the telegraph company to deliver a message is not excused, though it appear that the sendee lived beyond the free delivery limits and the extra charge for delivery beyond the limits had not been paid; it not appearing that the sender knew the company had any free delivery limits, or that it demanded payment of an extra charge." *Bright v. Telegraph Co.,* 132 N. C., 317.

The plaintiff's action was dismissed for lack of sufficient evidence on a former trial and a new action was brought. A new action may be brought in such cases (*Prevatt v. Harrelson,* 132 N. C., 254; *Evans v. Alridge*, 133 N. C., 380; *Nunnally v. Railroad*, 134 N. C., 755, and other cases, at this term) provided the new action is brought (as here) within one year. *Meekins v. Railroad,* 131 N. C., 2.

New Trial.

(WALKER, J., did not sit on the hearing of this case).

MONTGOMERY and CONNOR, JJ., concur in result.

OSBORN v. LEACH.

(Filed May 27, 1904).

1. LIBEL—*Officers—Burden of Proof—Newspapers—The Code, sec. 525.*

A publication by a newspaper that a director of the state's prison is guilty of a gross breach of official duty and the receipt of money illegally is libelous *per se*, and the burden is on the defendant to prove the truth thereof or matter in mitigation.

2. LIBEL—*Constitutional Law—Const., N. C., Art. I, secs. 20, 35—Acts 1901, ch. 557—Damages.*

An act taking away from a person the right to recover punitive damages in case of libel is constitutional.

3. LIBEL—*Burden of Proof—Questions for Jury—Damages.*

In an action for libel against a newspaper, the paper having pleaded a retraction of the publication, it is necessary for the defendant to show that the publication was made in good faith, and with reasonable ground to believe it to be true, in order to relieve the paper from punitive damages.

4. DAMAGES—*Libel—Mental Anguish—Newspapers.*

Actual damages include pecuniary loss, physical pain, mental suffering, and injury to reputation.

5. LIBEL—*Constitutional Law—Newspapers.*

Where a statute for libel applies equally to all newspapers and periodicals, it does not amount to an unconstitutional discrimination.

6. LIBEL—*Notice—Pleadings—Demurrer.*

In an action against a newspaper for libel the failure of the complaint to allege the five days' notice renders it demurrable.

7. LIBEL—*Notice—Pleadings—Amendment.*

Where a demurrer was sustained to a complaint for libel against a newspaper because it failed to appear that notice of the action had been given, the trial court may permit an amendment showing that fact.

8. LIBEL—*Notice—Damages—Newspapers.*

In an action for libel against a newspaper the failure to give notice of the action as required only relieves the paper of punitive damages.

9. LIBEL—*Notice—Newspapers.*

In an action for libel, where the newspaper publishes a retraction, no notice as required by acts 1901, ch. 557, need have been given.

ACTION by W. H. Osborn against M. T. Leach and the News and Observer Publishing Company, heard by *Judge O. H. Allen* and a jury, at December Term, 1903, of the Superior Court of GUILFORD County. From a judgment for the defendants the plaintiff appealed.

King & Kimball, J. T. Morehead and *T. M. Argo,* for the plaintiff.

J. A. Barringer, Armistead Jones & Son. for defendant Leach.

Busbee & Busbee and *Brooks & Thompson,* for the defendant News and Observer Publishing Company.

CLARK, C. J. This is an action for libel against M. T. Leach and the News and Observer Publishing Company. Judgment by default for want of an answer and inquiry had been taken against the defendant Leach. 132 N. C., 1149; S. C., 133 N. C., 27. In the trial upon the merits, at the close of the plaintiff's evidence the defendant Leach moved to dismiss "upon the ground that the newspaper article alleged to be libelous was not libelous, and that the plaintiff had not alleged a cause of action." The Court being of that opinion instructed the jury (on account of the judgment by default and inquiry) to return a verdict of one penny as to Leach, and thereupon rendered a judgment

against him for one penny damages and one penny costs. The Code, section 525, subsection 4.

In this there was error. The publication inspired by the defendant Leach charged that the plaintiff bought for the State's Prison, of which he was a director, certain mules, giving twenty-seven dollars per head more than they were worth, and paying for horses double what they were worth, thus depriving the State's Prison of that sum, and charged further that the plaintiff received for his services five dollars for each mule bought, as commissions, besides his expenses and several hundred dollars for his time, when, as director, by law, he was entitled to four dollars per day only (Laws 1899, chapter 24, sections 4, 9, 10). This, if not a direct charge of fraud is at least an allegation of a gross breach of official duty and misconduct by the plaintiff as director of a State institution, and incompetence, if not worse, in the purchase of the mules and horses, and the receipt of pay in excess of that allowed by law. This language was libelous *per se* (*Ramsey v. Cheek,* 109 N. C., 270), and the burden was upon the defendant to prove their truth or matter in mitigation.

As to the other defendant, the News and Observer Publishing Company, the Court allowed the motion made to dismiss upon the grounds (1) "that the plaintiff had not given it the notice required by chapter 557, Laws 1901; (2) that the plaintiff had not made out a case against it; and (3) upon the further ground that the plaintiff's counsel admitted in open court that the plaintiff had not sustained and did not claim any special damage." The second ground is disposed of by what is said above. The article was not copied from any paper which had then been filed in any legal proceeding, but was an oral statement by the defendant Leach to the reporter of the *News and Observer* of what he intended to file. The burden was upon the defendant Publishing

Company to prove the truth of the publication or to prove the absence of malice.

The other two points raise the question of the constitutionality of chapter 557, Acts 1901, commonly known as the "London Libel Law." That statute has been adopted in several States in almost the identical words of our statute. It has been already presented in the Supreme Court of two of our sister States and has been held to be unconstitutional in both, but because of the addition of words restricting "actual damages" to mean special damages, which words are not in our statute.

The Constitution of North Carolina provides: "All courts shall be open, and every person, for an injury in his lands, goods, person, or *reputation, shall* have remedy by due course of law." Article I, section 35. "The freedom of the press ought not to be restrained, *but every individual shall be held responsible for the abuse of the same.*" Article I, section 20.

If, therefore, this chapter impairs the right of any one to recover for an injury to his reputation, or abridges the responsibility of the press for an abuse of the freedom of the press, the Legislature is clearly forbidden by the above sections of the Constitution from the enactment of such statute.

Section 1, chapter 557, Acts 1901, is as follows: "Before any proceedings, either civil or criminal, shall be brought for the publication in a newspaper or periodical in this State of a libel, the plaintiff or prosecutor shall at least five days before instituting such proceedings serve notice in writing on defendant or defendants, specifying the article and the statements which he alleges to be false and defamatory. If it shall appear upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true,

and that within ten days after the service of said notice a full and fair correction, apology and retraction were published in the same editions of corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case, if a civil action, shall recover *only actual damages,* and if in a criminal proceeding, a verdict of guilty shall be rendered on such a state of facts, the defendant or defendants shall be fined a penny and costs and no more; provided this act shall not apply to existing suits." It must be noted that there is no penalty on the plaintiff nor any exemption to the defendant if the plaintiff does not chose to give the five days' notice, but there is merely a provision that five days' notice must be given by the plaintiff, in the manner stated, before issuing his summons, and that when such notice is given, then if within ten days the specified retraction is made, and it appears that the article was printed in good faith by honest mistake and with reasonable ground to believe the statements to be true, the plaintiff can only recover actual damages. It was, therefore, error in the Court to nonsuit the plaintiff, because good faith, honest mistake and reasonable ground of belief were affirmative defenses which the Court could not adjudge. But independently of that, as the argument raises the constitutionality of the act, it is well to dispose of it.

The plaintiff is entitled to recover actual damages under the Act of 1901; and actual are compensatory damages, and include (1) pecuniary loss, direct or indirect, *i. e.*, special damages; (2) damages for physical pain and inconvenience; (3) damages for mental suffering; and (4) damages for injury to reputation. Punitive damages are not included in what is termed actual or compensatory damages, and the act, upon the conditions therein specified, relieves and can relieve a defendant only against a claim for that particular

kind of damages. Punitive damages are awarded on grounds of public policy and not because the plaintiff has a *right* to the money, but it goes to him merely because it is assessed in his suit. 18 Am. & Eng. Ency. (2 Ed.), 1901; *Wallace v. Railroad,* 104 N. C., 452.

The right to have punitive damages assessed is, therefore, not property. The right to recover actual or compensatory damages *is property.*

In our case the law presumes injury to the feelings, mental anguish, and injury to the reputation, the publication being libelous *per se.* The evidence of the plaintiff, besides, proves both these elements, and also physical suffering. There is no evidence of special damages, and it is not inferred. The plaintiff is entitled to recover compensation for mental and physical pain and injury to reputation. These are *actual* damages, and these are *property.* "The right to recover damages for an injury is a species of property and *vests* in the injured party immediately on the commission of the wrong. It is not the subsequent verdict and judgment but the commission of the wrong that gives the right. The verdict and judgment simply define its extent. Being property, it is protected by the ordinary constitutional guarantees." Hale on Damages, page 2, note 5; Cooley Const. Lim. (5 Ed.), 445. It cannot be *extinguished* except by act of the parties or by operation of the statute of limitation. *Ibid.*

This being an action upon a libel *per se* the plaintiff has a right to recover *compensatory* damages. Newell on S. & L., 43; Hale, *supra,* page 99. Compensatory damages include all other damages than punitive, thus embracing not only special damages as direct pecuniary loss, but injury to feelings, mental anguish and damages to character or reputation. 18 Am. & Eng. Ency. (2 Ed.), 1082, *et seq.*; Hale, *supra*, 106 and 99. Actual damages are synonymous with compensatory damages and with general damages. Newell,

supra, 839; 18 Am. & Eng. Ency. (2 Ed.), 1081, *et seq.* Damages for mental suffering are actual or compensatory. They are not special nor punitive, and are given to indemnify the plaintiff for the injury suffered. 1 Am. & Eng. Ency. (2 Ed.), 602. The law infers actual or compensatory damages for injury to the feelings and reputation of the plaintiff from a libel calculated to humiliate him or injure his reputation or character.

In similar statutes adopted in other States the following words were added (which are wisely omitted in our statute), *i. e.*, that actual damages shall mean only "such damages as the plaintiff has suffered in respect to his property, business, trade, profession or occupation." And on account of the inclusion of those words, which restrict actual damages to mean special damages, the act has been held unconstitutional in most conclusive opinions by very able courts, both in Kansas and Michigan.

In a recent opinion, *Hanson v. Krehbiel*, filed March 12, 1904, the Supreme Court of Kansas, 75 Pac., 1041, passing upon the constitutionality of chapter 249, Laws 1901, of that State (which is *verbatim* our libel law, chapter 557, Laws 1901, save the addition in the Kansas statute of the definition of actual damages, as above stated), holds that the statute is unconstitutional because in violation of section 18 of the Kansas Bill of Rights, which gives to all persons injured in person, *reputation* or property remedy by due course of law, such constitutional guarantee being almost identical with the above-cited section 35, Article I, of the Constitution of North Carolina. The Supreme Court of Kansas says: "It will be noted that the questioned statute limits the right of recovery in cases of libel to actual damages, where, after service of notice provided in the first section, the publisher of the newspaper in which the libelous matter has appeared

shall make a full and fair retraction of the libelous matter, coupled with a showing upon the trial that the same was published in good faith, under a misapprehension of the facts; and defines that class of damages to be such as the plaintiff has suffered in respect to his property, business, trade, profession or occupation. So that in such cases the libeled party may not recover all his damage, but he is confined to the narrow class designated and defined in the act as 'actual damages.' The common law recognizes two classes of damages in libel cases—general and special. General damages are those which the law presumes must naturally, proximately and necessarily result from the publication of the libelous matter. They arise by inference of law and are not required to be proved by evidence. They are allowable whenever the immediate tendency of the words is to impair the plaintiff's reputation, although no actual pecuniary loss had in fact resulted, and are designed to compensate for that large and substantial class of injuries arising from injured feelings, mental suffering and anguish, and personal and public humiliation, consequent upon the malicious publication of the false and libelous matter. The injury for which this class of damages is allowed is something more than merely speculative. While not susceptible of being accurately measured in dollars and cents, it is a real one, and more often than otherwise more substantial and real than those designated as actual, and measured accurately by the dollar standard. In short, it is such an injury to the reputation as was contemplated in the Bill of Rights. The law presumes that this class of injuries resulted necessarily from the publication of the libelous matter, and the damages, therefore, were recoverable without special assignment. Special damages were also recoverable when properly pleaded and shown and were such damages as were computable in money, and may be said to be fairly embraced

in the list of actual damages as given in the statute referred to. This was the condition of the law at the time of the adoption of our Constitution, and is now, and all these are the injuries to reputation for which it provided that there should be 'remedy by due course of law.'

"It requires no argument to demonstrate that the act in question does deny remedy for a portion of these injuries. Unless the one libeled has suffered in the particular manner pointed out in the statute, he is remediless. For that other large class of persons and still larger class of injuries, no remedy is found. From the writings of the world's wisest man we have the assurance 'that a good name is rather to be chosen than great riches.' Yet the possessor of this thing of greatest value, being despoiled of it, is left entirely without remedy for its loss by the statute in question, except in such rare cases as he shall be able to show some exact financial injury in the particulars named. We could not excuse ourselves for holding that reputation is less valuable than property, or that it is less protected from spoliation by the quoted provision of the Bill of Rights.

"It is suggested, however, that the retraction required by the act to be published is a fair compensation for the injury done, and a reinvestment of the libeled one with his good name. This being done, all has been accomplished that would be by a verdict of a jury, and hence that the retraction required by the legislative enactment is, if not 'due course of law,' an ample substitute for it. It is not an easy task to deduce either from reason or the authorities a satisfactory definition of 'law of the land' or 'due course of law.' We feel safe, however, from either standpoint, in saying these terms do not mean any act that the Legislature may have passed, if such act does not give to one opportunity to be heard before being deprived of property, liberty or reputation, or having been deprived of either does not afford a

like opportunity of showing the extent of his injury, and give an adequate remedy to recover therefor. Whatever these terms may mean more than this, they do mean due and orderly procedure of courts in the ascertainment of damages for injury, to the end that the injured one 'shall have remedy,' that is, proper and adequate remedy, thus to be ascertained. To refuse hearing and remedy for an injury after its infliction is a small remove from infliction of penalty before and without hearing."

It further says:

"The retraction required by the act in question may or may not be full reparation for the injury suffered. It might the rather aggravate the injury already inflicted than mollify it. It is sufficient to say, however, that all these are questions for the courts upon proper notice to all parties, and may not be determined arbitrarily by an act of the Legislature. * * * It is claimed that admitting the constitutional invalidity of this act because it denies remedy by due course of law, still the Legislature would have a right to require the service of this notice as a step in the procedure in prosecuting an action for the recovery of damages occasioned by libel; this, in order to give the publisher opportunity of retraction for the purpose of mitigating general damages and relieving himself from punitive damages. We do not deny that the Legislature might do this. It seems to us, however, that such was not its purpose and object, but rather that the service of this notice was but a step in the procedure to relieve publishers from all general damages. That object being found unconstitutional, these ancillary matters must go with it."

We have thus copied at some length the discussion of an almost identical statute by the very able Supreme Court of our sister State, because of the clearness and vigor with which it presents our own views upon the subject.

The Supreme Court of Michigan also holds a similar statute unconstitutional, *Park v. Free Press*, 72 Mich., 560, 1 L. R. A., 599, 16 Am. St. Rep., 540, saying:

"We do not think the statute controls the action or is within the power of constitutional legislation. This will, in our judgment, appear from a statement of its effect if carried out. It purports to confine recovery in such cases against newspapers to what it calls 'actual damages,' and then defines actual damages to cover only direct pecuniary loss in certain specified ways, and none other. In some of these defined cases, the proof of any damages in this sense would be impracticable, and in all it would be very difficult. They are confined to damages in respect to property, business, trade, profession or occupation. It is safe to say that such losses cannot be the true damage in a very large share of the worse cases of libel. A woman who is slandered in her chastity is under this law usually without any redress whatever. A man whose income is from fixed investment or salary or official emolument, or business not depending upon his repute, could lose no money directly unless removed from the title to receive his income by reason of the libel, which could seldom happen. If contradicted soon, there could be practically no risk of this. And the same is true concerning most business losses. The cases must be very rare in which a libel will destroy business profits in such a way that the loss can be directly traced to the mischief. There could never be any loss when employers or customers know or believe the charge is unfounded. The statute does not reach cases where a libel has operated to cut off chances of office or emolument in the future, or broken up or prevented relationships not capable of an exact money standard, or produced that intangible but fatal influence which suspicion, helped by ill-will, spreads beyond recall or reach by apology or retraction. Exploded lies are continually reproduced

without the antidote, and no one can measure with any accurate standard the precise amount of evil done or probable. There is no room for holding in a constitutional system, that private reputation is any more subject to be removed by statute from full legal protection than life, liberty or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief."

This case has subsequently been approved by the same Court in *McGee v. Baumgartner*, 121 Mich., 287, where the Court holds that "The right to recover in an action of libel for damages to reputation cannot be abridged by statute."

These decisions were by unanimous courts. A contrary view was expressed, but by a divided Court, in *Allen v. Pioneer Press*, 40 Minn., 117, 3 L. R. A., 532, 12 Am. St. Rep., 707, based mainly upon the reasoning that the retraction being required, as it is, to be published as widely and to substantially the same readers, is usually a more complete redress than would be a judgment for damages. But as the Kansas Supreme Court, *ut supra*, well observes, this may or may not be true, and even if true it is not "remedy by due course of law" which section 35, Article I, guarantees that every person shall have through the courts "for an injury to his lands, goods, person or *reputation*." He is entitled by constitutional right to have such injury determined and the amount of just compensation for his wrong settled by a jury of his peers. He cannot be deprived of this by a legislative adjudication, beforehand, that a retraction by the newspaper is full compensation for the injury he has suffered. And even in that case (*Allen v. Pioneer Press*), a new trial was granted because the question of good faith should have been submitted to the jury.

It was therefore error in the Court below to sustain the

third ground of the motion, which construed the statute as restricting the recovery to special damages. Those words are not in our statute, and if they were the statute would be unconstitutional, as we have seen. Besides, as above stated, whether the publication was made in good faith, honest mistake, and with reasonable ground of belief—the conditions which, taken with the retraction, would relieve from punitive damages—is an affirmative defense to be found by the jury upon the evidence. It was error for the Court to find it.

The provision for retraction, construed according to its palpable meaning, as affording opportunity to escape punitive damages only, and when there was good faith, honest mistake, and reasonable ground of belief before publication, is an appropriate remedy, in its terms, for newspapers and periodicals, and could not well apply to others. It applies equally to all newspapers and periodicals, and we do not think it a discrimination forbidden by the Constitution.

The only remaining question is whether the Court was justified in dismissing the action upon the first ground in the motion of the defendant, the News and Observer Publishing Company, for failure to give the five days' notice required before bringing an action of this nature. Such failure was held to be ground for demurrer in *Williams v. Smith,* 134 N. C., 249. The giving of such notice is required only for the purpose of furnishing the defendant opportunity to publish a retraction, the effect of which, as we have seen, could extend no further than to relieve from punitive damages, even when good faith, honest mistake and reasonable ground of belief are shown by the defendant. When such demurrer is sustained the action should not be dismissed, but the Court can still permit, in its discretion, the plaintiff to amend the complaint by averring such notice if it was in fact given, and if it was not, the action is still valid for the recovery of actual damages, *i. e.*, of all except

punitive damages, and it would be error to dismiss it. In this case failure to give the five days' notice in no wise could affect the defendant, for the additional reason that it actually did make the retraction, to afford the opportunity of doing which is the only reason for requiring the notice.

For the reasons given there must be, as to both defendants, a

New Trial.

DOUGLAS, J., concurring in result. While concurring in the result I feel constrained to say that in my opinion the so-call "Libel Act" is unconstitutional, inasmuch as it discriminates between the editor of a newspaper and the ordinary citizen. If I write a letter libelling an editor, that perhaps at most *ten* people may see, and he libels me by printing identical charges against me that *ten thousand* people may see, I am subject to pains and penalties from which he is exempted by operation of the statute. Whatever other merits the act may have, I do not think that such discrimination can be sustained under the explicit provision of our Constitution. It is, however, due to the Court to say that its opinion eliminates from the act its most dangerous features.

WALKER, J., concurs in result only.

CONNOR, J., did not sit on the hearing of this case.

JOHNSON v. DUVALL.

(Filed May 27, 1904).

1. ACKNOWLEDGMENTS—*Deeds—Seals.*

A commissioner of deeds for this state, residing in another state, is not required to affix his seal to the certificate acknowledging the execution of a deed conveying land in this state.

2. QUIETING TITLE—*Timber—Injunction—Acts 1901, ch. 666.*

Before an order allowing a person to cut timber can be made in an action to quiet title, the court must find as a fact and incorporate it in the order that the party allowed to cut the timber claims the land in good faith and has a *prima facie* title thereto, and that the claim of the adverse party is not made in good faith.

ACTION by E. S. Johnson and others against Morgan Duvall and others, heard by *Judge E. B. Jones,* at chambers, at Murphy, N. C., April 9, 1904.

The record in this case presents an appeal from an order made by his Honor *Judge Jones,* permitting the defendant J. B. Thomas to cut and remove timber from the lands in controversy pending the trial of the cause upon its merits. The facts found by his Honor are that the title to the *locus in quo* was conceded to have been in W. H. Wilson, under whom all parties claim title. On February 1, 1859, said Wilson executed a deed containing operative words sufficient to pass the title to Alice A. Farrer. The original deed was not in evidence. A certified copy of the deed, together with the certificate of probate and order of registration, was used in the hearing before the Court upon the motion for the injunction. It appears that the acknowledgment of the execution by the maker was before a commissioner of deeds for this State residing in the City of Washington, D. C. His

certificate concludes with the words, "Given under my hand and seal," etc. There is nothing on the certified copy showing that an official seal was affixed to the certificate. A certificate is attached entitled:

"COURT OF PLEAS AND QUARTER SESSIONS, MARCH TERM, A. D. 1859.

"On motion it was ordered by the Court that the foregoing deed for land in Jackson County, North Carolina, from W. H. Wilson and Martha R. Wilson of Prince George County, State of Maryland, to A. A. Farrer of Montgomery County, State aforesaid, be recorded and registered in Jackson County with privy examination thereto, as appears from the certificate of Charles Walter, Commissioner of Deeds for the State of North Carolina, residing in Washington City. Certified the 8th day of April, A. D. 1859.

"A. M. ENLOE, *Clerk.*

"Witness: WM. R. BUCHANAN, *R. J. C.*"

The land was devised by A. A. Farrer to George and James Frame, the last named devising his interest to said George Frame, who on March 10, 1904, conveyed such title as he had to J. B. Thomas, who at March Term, 1904, was made a party defendant by the Court. The said W. H. Wilson, on August 16, 1884, executed a deed for said land to his wife, Martha R. Wilson, who by her last will and testament conferred upon her executor power to sell the same. Pursuant to such power the said executor, on February 24, 1893, conveyed the said land to the ancestors of the plaintiffs.

There was evidence before his Honor in regard to the payment of taxes. There was no evidence of any possession by either of the parties, the *locus in quo* being wild mountain land chiefly valuable for timber. The plaintiffs allege that

the defendants Duvall & Mendenhall were cutting timber on the land, and prayed an injunction pending the litigation. A restraining order was made by his Honor *Judge Ferguson* enjoining the defendants Duvall & Mendenhall from cutting the timber until the final hearing. At the same time an order was made continuing the motion for a receiver to be heard before his Honor *Judge Jones*. The said J. B. Thomas filed an affidavit in the cause, setting out his title and alleging that he was operating a saw-mill with a large crew of hands near the lands; that he was about through with the timber and desired to move his mill and outfit on the land covered by the grants which are in controversy in this action, and upon such affidavit moved that he be permitted to cut and remove the logs. His Honor granted the motion and the plaintiffs appealed.

George H. Smathers and *Shepherd & Shepherd*, for the plaintiffs.

A. M. Fry, for the defendants.

CONNOR, J. It will be observed that this action was originally brought against Mendenhall & Duvall and they were enjoined from cutting the timber from plaintiffs' land. Thereafter Thomas, who had been made party defendant, filed an affidavit which was heard before *Judge Jones* as the basis for a motion to be permitted to cut and remove the timber during the pending of the action. His Honor granted the order, basing his action upon his opinion that the title to the land passed by the deed executed by William H. Wilson to Alice A. Farrer, bearing date August 1, 1859, which title vested in Thomas. The deed from Frame to Thomas contains certain provisions and stipulations, which were argued by counsel, constituting an agreement for maintenance of a lawsuit thereby vitiating the deed. The discussion

in this Court was largely directed to the validity of the probate of the deed from Wilson to Farrer, the plaintiffs contending that it was invalid for that no seal was attached to the certificate of the commissioner of deeds, and further that the order of registration was defective in that there was no adjudication that the deed had been properly proved before the Commissioner of Deeds. The power of the commissioner to take acknowledgment or proof of the execution of deeds executed in other States conveying land situate in this State is found in chapter 37, section 5, of The Revised Code. It does not appear from an examination of that section that the commissioner is required to affix any seal to his certificate, the language being: "And duly certified by him, such deed, power of attorney, bill of sale or other instrument, being exhibited in the Court of Pleas and Quarter Sessions of the county where the property is situate, or to one of the Judges of the Supreme Court or of the Superior Courts of this State, shall be ordered to be registered with the certificates thereto annexed." It is certainly usual for Commissioners of Deeds or affidavits to affix their official seal to certificates made by them. We have carefully examined the several statutes bearing upon the subject and cited in the briefs and find no statute requiring a seal to be affixed to such certificate.

It is further contended that the certificate of the Clerk does not show affirmatively that the Court adjudged the certificate of the commissioner to be in due form or that the proof or acknowledgment was properly taken. It will be observed that the deed was exhibited in open Court, and it may be that upon the trial it will appear from the minutes of the Court that the proper adjudication was made. It would seem that the law would raise a presumption to that effect. We prefer deferring a decision of this question until the cause shall be brought to trial and the evidence, together

with the minutes of the Court of Pleas and Quarter Sessions, introduced. There is, however, a view of the case not presented by the briefs which we think it proper to decide, as it affects a matter of interest to the public. The order is evidently based upon the power conferred upon the Court by chapter 666 of the Laws of 1901, the first section of which provides: "That in all actions to try title to timber lands and in all actions for trespass thereon for cutting timber trees, whenever the Court shall find as a fact that there is a *bona fide* contention on both sides based upon evidence constituting a *prima facie* title, no order shall be made pending such action permitting either party to cut said timber trees, except by consent, until the title to said land or timber trees shall be finally determined in such action. That whenever in any such action the Judge shall find as a fact that the contention of either party thereto is not in good faith, and is not based upon evidence constituting a *prima facie* title, then upon motion of the other party thereto who may satisfy the Court of the *bona fides* of his contention, and who may produce evidence showing a *prima facie* title, the Court may allow such party to cut the said timber trees by giving bond," etc. We think that before an order vitally affecting the rights of either party shall be made, such as the permission to cut the timber, the Court shall find as a fact, and incorporate such finding in the order, that the contention of the party against whose claim the order is made is not in good faith and that the contention of the party in favor of whom the order is made is in good faith and based upon a *prima facie* title. The order in this cause finds neither of these facts and for that reason we think is erroneous.

Serious questions being presented for determination on the hearing of this cause, we think that in the absence of any finding that the plaintiffs' contention was not made in good faith and that the defendant's contention was *bona fide* and

based upon a *prima facie* title, the property should have been left in *statu quo* until the final hearing. Without passing upon the other questions argued before us the order of his Honor is reversed.

Reversed.

KELLY v. JOHNSON.

(Filed May 31, 1904).

IMPROVEMENTS—*Specific Performance—Contracts.*

One who occupies land under a parol contract of purchase and who has made valuable improvements thereon, is entitled, on interpleading in a suit by a subsequent purchaser for specific performance, to the value of his improvements, to be deducted from the balance of the purchase-money due from plaintiff, who, under his contract, is entitled to a deed with full covenants of warranty.

ACTION by J. T. Kelly against W. J. Johnson and others, heard by *Judge H. R. Bryan* and a jury, at October Term, 1903, of the Superior Court of CUMBERLAND County. From a judgment for the plaintiff the defendants appealed.

I. A. Murchison, for Martin Williams, the interpleader.
Seawell, McIver & King, D. T. Oates and *N. A. Sinclair,* in opposition.

CONNOR, J. Martin Williams, by permission of the Court, filed his interplea setting forth that during the month of September, 1896, he entered into a contract with the defendants for the purchase of one hundred acres of the upper end of the land described in the complaint, for which he agreed to pay the sum of $200. That defendants caused the land to be surveyed and put him in possession thereof; that

he has remained in possession ever since, and that plaintiff well knew that he was in the actual possession of said one hundred acres when he made his contract with defendants. That he has made improvements, buildings, etc., at a cost of $100; that he holds receipts for money paid by him to defendants on said land "headed," "Received of Martin Williams on land," amounting to $98. That he is ready and anxious to pay the balance of the purchase-money on receipt of a deed, etc. The plaintiff demurred *ore tenus* to the interplea; the demurrer was sustained and the interpleader excepted and appealed.

The facts set forth in the interplea and admitted by the demurrer appeal very strongly to a court of conscience for relief. We should hesitate long and consider anxiously before concluding that no relief in such case can be found in the doctrines of equity. That the innocent, and we presume ignorant, man, who, relying upon the promise of his vendor, has entered upon the land, improved and partly paid for it, must go forth bereft of his money, with no pay for his improvements, can be permitted only in obedience to some statute or unvarying principle of law beyond the power of the chancellor.

It is well settled that the defendants upon the admitted facts cannot oust him from the land without accounting to him for his improvements and purchase-money paid. To permit them to do so would, in the language of *Judge Gaston* in *Albea v. Griffin,* 22 N. C., 9, be "against conscience." "If they repudiate the contract, which they have a right to do, they must not take the improved property from the plaintiff without compensation for the additional value which these improvements have put upon the property." *Daniel v. Crumpler,* 75 N. C., 184; *Hedgepeth v. Rose,* 95 N. C., 41; *Pitt v. Moore,* 99 N. C., 91, 6 Am. St. Rep., 489; *Tucker v. Markland,* 101 N. C., 422, in which *Merrimon, J.*, said:

"It seems that having paid the money he took possession of the land in pursuance of his supposed right under the voidable contract of purchase and with the sanction of the vendor. It would be inequitable and against conscience to allow the latter to turn him out of possession without restoring his outlay in cash and for valuable improvements put on the land while so in possession." *Vann v. Newsom*, 110 N. C., 122. It would seem that the receipts set out in the interplea are too indefinite to be used as a contract to convey. *Fortescue v. Crawford*, 105 N. C., 29; *Harris v. Woodard*, 130 N. C., 580.

The question is presented whether the plaintiffs or the defendants are liable to the interpleader. Assuming the facts to be as set out in the interplea and admitted by the demurrer, the plaintiff had notice of the equity of the interpleader when he entered into the contract of purchase and paid a part of the purchase-money. Having such notice, he took the equitable title subject to the equity of the interpleader, and when he acquires the legal title by the deed which the defendant is directed to execute, or using the judgment as a conveyance of the legal title, his right to oust the interpleader will be subject to the equity of the interpleader for reimbursement in the same as the defendants would have been. As, however, it appears by the pleadings and bond for title that he is entitled to have a deed with full covenant of warranty, we can see no reason why he may not withhold the balance due defendants on the purchase- money until upon an accounting it is ascertained what amount he will have to pay the interpleader to secure possession of the land. As all parties in interest are before the Court a judgment may be drawn so that their rights may be protected. This will be done by directing an accounting between defendants and the interpleader and the payment from the balance of the purchase-money of the amount due him. He will,

upon such payment being made, surrender possession of the land to the plaintiff. If the plaintiff, or the defendants, shall wish and shall be permitted to file an answer to the interplea, raising issues of fact, the final judgment will await the trial of such issues. The judgment sustaining the demurrer is reversed. Let a judgment be drawn in accordance with this opinion. The plaintiff will pay the costs of this Court.

Reversed.

KELLY v. JOHNSON.

(Filed May 31, 1904).

1. SPECIFIC PERFORMANCE — *Vendor and Purchaser — Issues — Fraud—Mistake.*

In a suit by a vendee for specific performance, defended on the ground that certain land was included in the contract by mistake, an issue tendered by defendant which omits to direct inquiry to the mutuality of the mistake is properly rejected.

2. SPECIFIC PERFORMANCE—*Vendor and Purchaser—Mistake—Evidence.*

In an action by a vendee for specific performance, evidence of the defendant vendor as to who was living on land claimed by a prior purchaser from him under an oral contract at the time of the execution of plaintiff's contract is admissible on the issue raised by defendant of a mutual mistake in the latter contract in including such land.

3. EVIDENCE—*Appeal—Harmless Error.*

The erroneous exclusion of evidence is not reversible error when such evidence is afterwards admitted.

4. EXCEPTIONS AND OBJECTIONS—*Instructions—New Trial.*

Even though an exception to the denial of a motion for a new trial be construed as an exception to the charge, it cannot be reviewed, since it is a "broadside exception."

KELLY *v.* JOHNSON.

ACTION by J. T. Kelly against W. J. Johnson, heard by *Judge H. R. Bryan* and a jury, at October Term, 1903, of the Superior Court of CUMBERLAND County.

On November 24, 1897, the defendants W. J. Johnson, W. H. Britton and A. M. Prince, doing business under the name and style of The Manchester Lumber Company, executed a bond for title to the plaintiff obligating themselves to convey to him upon the payment of the purchase price a good and sufficient deed for three tracts of land, described by metes and bounds. Plaintiff paid several of the notes at maturity and tendered the balance due on the purchase price and demanding the execution of a deed in accordance with the condition of the bond. W. J. Johnson, who had acquired the rights of the other obligors, tendered a deed for said land, excepting therefrom one hundred acres claimed by one Martin Williams. The plaintiff refused to accept the deed as tendered and instituted this action to compel specific performance. The defendant, admitting the execution of the bond, payment, tender, etc., averred by way of defense, and as the basis for equitable relief, that prior to the execution of the bond for title the defendant had entered into a contract with Martin Williams to convey to him one hundred acres of the land described in the bond. That Williams had entered into possession of the land and had made payments on account of the purchase-money and improvements on the land. That the inclusion in the condition of the bond of said one hundred acres was "by inadvertence and oversight." That plaintiff knew of Williams' possession and interest, and that it was not intended to convey or include the said land in the bond. The defendants ask that the bond be so reformed that the said one hundred acres be excepted therefrom. Martin Williams was permitted to interplead and set up his claim to the one hundred acres. The cause coming on for trial, the plaintiff demurred *ore tenus* to the interplea

for that it failed to state any cause of action. The demurrer was sustained and the interpleader excepted. The defendant tendered certain issues which were rejected by the Court, and in lieu thereof the Court submitted the following issue: "Was the insertion of the one hundred acres in the bond for title by the defendants to the plaintiff a mutual mistake?" To which the jury responded "No." From a judgment upon the verdict the defendants appealed.

D. T. Oates, Seawell, McIver & King and *N. A. Sinclair,* for the plaintiff.

Robinson & Shaw, for the defendants.

CONNOR, J. The issue submitted by his Honor presented the contention to the jury. The first issue tendered by the defendants was defective in that it omitted to direct the inquiries to the alleged *mutuality* of the mistake. The second issue was directed to matter which was evidentiary. The exception cannot be sustained. The defendant W. J. Johnson was asked, on direct examination, "Who was living on and who was in possession of the land claimed by Martin Williams at the time of the execution of the bond for title?" This was, upon objection, excluded. We think that the question was competent upon the issue as to the mutual mistake. The defendants say that it was not the intention of either party to the contract to include the one hundred acres; that Martin Williams was in possession and that plaintiff had knowledge of it. This was a fact which the jury could consider upon the issue. The error, however, seems to have been cured by the answer to the question: "At the time of the execution of the bond who was in possession of the one hundred acres claimed by Martin Williams, and did the plaintiff in this action take the bond for title with notice that the one hundred acres was in possession of another under

contract of purchase, and did the plaintiff at that time know that the defendant did not intend to convey the one hundred acres of land?" The witness answered that he knew it was sold to Martin Williams and he could not say whether he knew that he did not intend to convey it or not. The witness was asked whether the one hundred acres was surveyed and the lines marked. The question was excluded, but the witness was recalled and testified: "The lines of Martin Williams' tract were distinctly marked." This cures the error in excluding the question when first asked. The other questions excluded were fully answered at other times during the examination of the witnesses. We find no reversible error in this respect. The parties were permitted to put their testimony fairly before the jury. The plaintiff denied all knowledge of the claim of Williams and the jury found in accordance with his contention.

His Honor instructed the jury that any contract to sell or convey lands, or any interest in them, unless some memorandum or note thereof is in writing, is void. That they would not consider the contract by parol to Williams. It was void so far as Kelly is concerned. The defendants must establish mistake by clear and convincing proof, by evidence outside the bond and inconsistent with it. The mistake must be mutual. It must be a mistake both upon the part of Kelly and Johnson and Britton, and they must show it—not Kelly. A parol contract is void. They had nothing to do with Williams. The defendants' brief discusses separately six exceptions, three of which are addressed to the charge. The record contains no exception to the charge, the entry being: "The defendants move for a new trial. Motion denied and defendants except. Judgment." If we should construe this as an exception to the charge it will not avail the defendants, being what is termed a broadside exception. It is settled that such

an exception will not be sustained. The record contains no assignment of error. We have examined the entire record and find no reversible error therein.

No Error.

BRINKLEY v. RAILROAD CO.

(Filed May 31, 1904).

1. EMINENT DOMAIN—*Railroads—Right-of-way—Acts 1854-5, ch. 228.*

A railroad company has a right to change the grade of its road-bed or to remove it to any point on its right-of-way.

2. EMINENT DOMAIN—*Railroads—Highways—The Code, sec. 1957.*

A railroad company may make a change in a county road that does not necessarily impair its usefulness.

DOUGLAS, J., dissenting.

ACTION by Henry Brinkley against the Southern Railroad Company, heard by *Judge T. J. Shaw* and a jury, at January (Special) Term, 1904, of the Superior Court of BURKE County. From a judgment for the defendant the plaintiff appealed.

Avery & Avery and *Avery & Ervin*, for the plaintiff.
S. J. Ervin, for the defendant.

MONTGOMERY, J. The question for consideration is whether or not a railroad company can use for any and all purposes connected with the conduct of railroad business the entire strip of land which it may have acquired by process of condemnation, or as a result of law growing out of the provisions of its charter. The defendant claims the right-of-way over the land in dispute under a purchase of the

interest in the same of the Western North Carolina Railroad Company, chartered by the General Assembly of this State. Laws 1854-'55, chapter 228. There was no condemnation of the land, but it is agreed that the Western North Carolina Railroad Company acquired the right-of-way over it by virtue of section 29 of the act of incorporation, which is in these words:

"And in the absence of any contract or contracts in relation to the lands through which said road may pass, it shall be presumed that the land over which said road may be constructed, together with one hundred feet on each side thereof, has been granted by the owner or owners to the company, and the said company shall have good right and title thereto, and shall have, hold and enjoy the same so long as it shall be used for the purposes of said road and no longer, unless the owner or owners shall apply for an assessment of the value of said land as hereinbefore directed within two years after that part of the said road has been located."

When that part of the road located on the land in dispute was finished, the track was laid in the center of the right-of-way and remained there until March, 1902, when the defendant changed the location by removing it about five feet to the southward from its original position for a part of the way on and along the right-of-way. The defendants also at the same time changed the grade of the original railroad track by substituting in one place a cut about six feet deep for a fill of about two and one-half feet in height. The plaintiff contends that that action of the defendant company was a new taking of his land, and for the trespass and taking he is entitled to compensation in damages. His contention, in his own words (in the brief), is: "That while the company could build side tracks on the same grade and inside of its right-of-way if necessary for corporate purposes, it had no right, first, to inflict additional damage upon the owner of

the servient tenement by changing a cut into a fill or a fill into a cut on his premises; second, that a change of location of the main line necessarily involved a change in the center of the right-of-way, and when the defendant moved its right-of-way five feet south of the original location and changed the center of that track it involved an additional taking of the land of the plaintiff on the south of the track, and a corresponding abandonment of a strip of equal width on the land of the abutting owner just north of Brinkley and on the opposite side of the track. This must be a new taking, being such a change as would change the location of the entire right-of-way along the plaintiff's front."

The right of the defendant to the free use of its right-of-way for railroad purposes is involved in the case. The question is not whether the Western North Carolina Railroad Company acquired the fee-simple interest or an easement in the right-of-way (that the question has been determined in favor of the latter view in *Blue v. Railroad*, 117 N. C., 644; *Railroad v. Sturgeon*, 120 N. C., 225; *Shields v. Railroad*, 129 N. C., 1); but rather whether under the easement the defendant has the right to use the whole of the right-of-way for railroad purposes, including the right to change the grade of the road-bed or to remove the location of its main track at any time to any point on the right-of-way. In the cases last above cited it was decided that railroad companies, if they should need the whole of the right-of-way for railroad purposes, had the right to use the whole. Some of those uses were mentioned in the decisions, viz., road-bed and drains, side-tracks, and houses for their employees, warehouses and station houses, with convenient ingress and egress. Under those decisions railroad companies could build as many side tracks over any part of the right-of-way as might be necessary to a proper conduct of their business, with a view to the safety of the travelling public as well as for its

own and the public interests. Why, then, have they not the right to change the grade of the main track, or alter the location of the main track, whenever the safety of their service is improved or the public interests require it? We can see no reason to the contrary.

If the plaintiff's house was situated on the right-of-way at the time the railroad was finished, and he acquiesced in the appropriation, he would have rights if the railroad company should have afterwards built high embankments or made deep excavations so near his residence as to materially interfere with the free use and enjoyment of his home. But no such matter is now before us. There is no such claim or demand in the complaint. The naked question before us is this: Whether or not a railroad company has a right to change the grade of its road-bed or to remove it to any point on its right-of-way? We think it has that right.

In Mills on Eminent Domain, at section 211, the author says: "There is a vast difference between the location of a right-of-way and the location of a track on a right-of-way. The company has the right to locate its track at its will and pleasure upon any part of its right-of-way. One location of its track does not deprive it of the right to make another location." *Dougherty v. Railroad Co.*, 19 Mo. App., 419; *State v. Sioux City*, 43 Iowa, 501; *Munkers v. Railroad*, 60 Mo., 334; *Comrs. v. Haverhill*, 7 Allen, 523.

In Pierce on Railroads the writer says: "It (the railroad company) may lay its tracks, side tracks as well as main tracks, at any place within the location, and shift them from place to place within it."

The defendant had the right to make the change in the county road under subsections 3 and 5 of section 1957 of The Code.

No Error.

WALKER, J., concurring. This case, in my judgment, is correctly decided and for the reasons given in the opinion of the Court as written by *Mr. Justice Montgomery*. So far as the questions incidentally referred to in the opinion, and which relate to the control of a railway company over its right-of-way, are concerned, it is best that I should withhold even any intimation of opinion in regard to them until they are directly presented for decision, when my judgment can be formed after mature consideration and reflection. As I view those questions they involve important interests, not only of private individuals and of the railway companies but of the public as well.

DOUGLAS, J., dissenting. I do not think the real question at issue is correctly stated in the opinion of the Court, which assumes as a fact the ownership by the defendant of a right-of-way of two hundred feet in width. If the defendant railway company had actually condemned, or bought, or had given to it one hundred feet on each side of its track through the plaintiff's land the case would be different. I do not understand that there is any pretense that the defendant paid anything whatever for its right-of-way, or was actually given any more land than it actually occupied. Its only claim for two hundred feet of land seems to rest upon a naked presumption founded upon a legal fiction in an unpleaded private statute. If a neighbor asks me to give him a few roasting ears, and I tell him to help himself, am I to be held to have given away my entire corn crop? Suppose the agents of a railroad company come to a generous citizen and say to him, "We want to go through your land; we will locate our track over one hundred feet from your house and so nearly on grade as to permit you to cross at any point without putting you to any discomfort or inconvenience," and he should say, "Go ahead, I will not charge

you for merely going through my land." By what process of reasoning can such permission be construed into a grant under which the company, by altering its location and changing its grade, can take his land, injure his remaining property, and destroy his home? Oh, but it is said, he should have brought suit within two years. Brought suit for what? He had neither the right nor the inclination to bring suit for the land he had given to the railroad; and I am ignorant of any authority by which he could have brought suit for land which was claimed by no one else, and of which he alone was in actual and undisturbed possession adverse to all the world. I cannot bring myself to hold that the Legislature had either the power or the intention of taking the land of an individual and giving it to a corporation without compensation or the opportunity of obtaining it. Why should the corporation, the creature of the law, have any greater privileges than the citizen, the creator of the law?

I have no desire whatever to unnecessarily interfere in the slightest degree with the construction or operation of railroads, and I am aware that their public character and the proper performance of their public duties justify and require the exercise of certain powers and privileges not possessed by the individual. An instance is the exercise of the power of eminent domain inherent in the State as the concrete representative of the sovereign people. But all such privileges, given alone for the public benefit, are subordinate to the public welfare, and must be exercised with due regard to the inherent and inalienable rights of the individual. If they need his land let them take it, but let them pay for it. Let them take it openly and fairly so that he may know what they claim, and let them pay for it, not in legal fictions or irrebutable presumptions, but in money or money's worth. In the words of the Court of Appeals of New York, "Take, but pay." The plaintiff is not seeking to prevent the defend-

ant from changing the location and grade of its track, but simply to obtain compensation for the *additional* injury done to him by such change. My views upon these questions are fully expressed in my dissenting opinion in *Jones v. Comrs.*, 130 N. C., 457, and *Dargan v. Railroad*, 131 N. C., 626, wherein I have attempted to discuss principles which to me seem to underlie the foundations of our government.

COMMISSIONERS v. WILLIAMS.

(Filed May 31, 1904).

INJUNCTION—*Pleadings—Bonds—Counties.*

A complaint by a board of county commissioners to enjoin the treasurer from paying interest on county bonds sought to be invalidated, which fails to allege that he has any funds applicable to such purpose, or that he threatens or purposes to pay any public funds on the bonds or interest, is fatally defective.

ACTION by the Commissioners of Henderson County against J. Williams, Tax Collector, heard by *Judge W. A. Hoke* and a jury, at November Term, 1902, of the Superior Court of HENDERSON County. From a judgment for the defendant the plaintiff appealed.

No counsel for the plaintiff.

H. G. Ewart, Anderson & Blythe, Toms & Rector and *McD. Ray*, for the defendant.

PER CURIAM. This action is brought by the plaintiff Board of Commissioners against the defendant Treasurer of the county, the relief asked being that the bonds issued by the commissioners of said county be declared invalid and the Treasurer be enjoined from paying the interest on said

bonds. It is to be observed that there is no allegation that the defendant has any funds in his hands applicable to such purpose, or that he threatens or proposes to pay any public funds on such bonds or the interest thereon. As the basis for invoking the injunctive power of the Court the complaint is fatally defective.

Action Dismissed.

VANN v. EDWARDS.

(Filed June 1, 1904).

1. MARRIED WOMEN—*Husband and Wife—Negotiable Instruments—Personal Property—Const. N. C., Art. X, sec. 6—The Code, sec. 1826.*

A married woman may dispose of her property by gift or otherwise without the assent of her husband, unless the law requires the disposition of it to be evidenced by a conveyance or a writing.

2. FORMER ADJUDICATION—*Appeal—Supreme Court.*

The supreme court, on a second appeal is not precluded under the doctrine of the law of the case from passing on a question not determined on the first appeal.

MONTGOMERY, J., dissenting.

ACTION by T. E. Vann, administrator of Darius Edwards, against D. K. Edwards, heard by *Judge M. H. Justice* and a jury at Fall Term, 1903, of the Superior Court of HERTFORD County. From a judgment for the plaintiff the defendant appealed.

Winborne & Lawrence and *George Cowper*, for the plaintiff.

L. L. Smith, for the defendant.

WALKER, J. This action was brought to recover the amount of two notes, one for the sum of $450 and the other for the sum of $500. We are concerned only with the latter note as the other is not in controversy. The note for $500 was executed by the defendant to his mother, Sarah F. Edwards, on the 8th day of June, 1888, and was payable eight years after its date with six per cent. interest. The defendant, having admitted the execution of the note, avers that it was transferred, endorsed and given to him by his mother, and he also avers that if the transfer from his mother was void he acquired title to the note by gift from his father. At the time the note was executed, and also at the time it was alleged to have been transferred to the defendant by his mother, Darius Edwards, the husband of Sarah F. Edwards, was living and did not assent to the transfer, and the same was made, if at all, without his knowledge and with the belief on the part of Mrs. Edwards and the defendant that he would not assent to the transfer. There was evidence in the case tending to prove that after Mrs. Edwards' death the note passed into the possession of her husband, who survived her, and remained in his possession until his death. There was evidence, on the contrary, which tended to prove that while the note was in the possession of Darius Edwards after the death of his wife it was delivered by him to the defendant, who kept it until the death of his father and had possession of it until this suit was brought, when it was handed by the defendant's wife to one of the defendant's attorneys. When the case was here before it was held that the defendant's possession of the note after the death of his father, in whose possession it had been subsequent to the death of his wife, who was the original owner and holder of the note, would, if established, raise a presumption that such possession was lawful and that he is the owner of the note, and a new trial was granted to the defendant because

of an erroneous ruling in the Court below upon this point. At the second trial an issue was submitted to the jury as to the ownership of the note, the plaintiff asserting title to it as the administrator of Darius Edwards. The jury found against the defendant, and judgment having been rendered upon the verdict for the plaintiff the defendant excepted and appealed. The only exceptions which we need notice were taken to the charge of the Court, and to an instruction of the Court given to the jury at the plaintiff's request, which is as follows: "If you find from the evidence that the defendant acquired possession of the $500 note by delivery from his mother, without the knowledge or consent of his father, Darius Edwards, then no title to the note would pass to the defendant thereby; and if that were his only claim to the note you should answer the first issue 'Yes.'" The Court also charged the jury, among other instructions, to which no exception was taken, as follows: "If the note was executed by the defendant to his mother and by her endorsed and transferred to the defendant without her husband's knowledge or consent, and that was his only claim, that would avail the defendant nothing, and the note would have passed to the husband as his property upon the death of his wife, subject to the payment of her debts." Defendant excepted. These two exceptions are in substance the same and may be considered together, and they involve the question whether a married woman can make a valid transfer to another of a note belonging to her without the written consent of her husband.

The Constitution (Article 10, section 6) provides as follows: "The real and personal property of any female in this State, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and

may be devised and bequeathed, and with the written assent of her husband, conveyed by her as if she were unmarried." It is provided by The Code, section 1826, that, "No woman during her coverture shall be capable of making any contract to affect her real or personal estate, except for her necessary personal expenses, or for the support of the family, or such as may be necessary in order to pay her debts existing before marriage, without the written consent of her husband, unless she be a free trader, as hereinbefore allowed."

Our answer to the question we have stated must be in the affirmative. The decision of the case turns upon the construction of section 6 of Article X of the Constitution, for if by that section a married woman is vested with the power of disposing of her personal property, such as the note upon which the suit was brought, this power cannot be divested or taken from her by any act of the Legislature, and section 1826 of The Code can have no operation in such a case, assuming it to be fully sufficient in its scope to embrace her executed contracts of sale or gifts.

It is provided by the Constitution, which is the higher and indeed the supreme law to which all conflicting legislation must yield, that the property of every female, whether acquired before or after her marriage, shall be and remain her sole and separate estate and shall not be liable for any of the debts, obligations, or engagements of her husband. If this were all of the section, we would have to conclude that as a married woman is thus vested with full and complete ownership of things real and personal acquired by her before or after her marriage, having both the legal and equitable title, she must necessarily have also acquired every right which inheres in or is incidental to such ownership, and the most important and most valuable among them is the right of alienation—or what is commonly known in the law as the *jus disponendi*. While this may not accord with the view

taken of that section in one or two of the cases, it will be found upon examination that they did not involve a decision of the question of a married woman's right to dispose of her personal property, but of her power to contract so as to bind her property generally, and it was held that, notwithstanding the provision of section 6 of Article X of the Constitution, the disability of coverture remains as it was at common law and prevents her from making a valid executory contract.

It will be observed that it is ordained by the Constitution that all that a married woman has or acquires in things real and personal shall be her sole and separate estate and property. The word "property" is of very broad signification. It is defined as "rightful dominion over external objects; ownership; the unrestricted and exclusive right to a thing; the right to dispose of the substance of a thing in every legal way, to possess it, to use it and to exclude every one else from interfering with it. Property is the highest right a man can have to anything, being used for that right which one has to lands or tenements, goods or chattels, which no way depends on another man's courtesy. A right imparting to the owner a power of indefinite user, capable of being transmitted to universal successors by way of descent, and imparting to the owner the right of disposition. * * * The right of property is that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe. It consists in the free use, enjoyment and disposal of all a person's acquisitions without any control or diminution save only by the laws of the land." Black's Law Dict., pages 953, 954. The word "estate," which is also used in the Constitution, denotes the interest which any one has in lands, or in any other subject of property. An estate in lands, tenements and hereditaments, says Blackstone, signifies such interest as the tenant has therein. 2 Bl. Com.,

103. It also signifies the condition or circumstance in which the owner stands with regard to his property. Both words are also used to describe the thing, real or personal, in which one has an estate or the subject-matter of ownership, or over which the right of property is exercised, and in this sense, perhaps, they were intended to be used in the Constitution. But the very word "property" implies the exclusive right of possessing, enjoying and disposing of a thing and, when used subjectively, it means that with respect to which this right exists or that which is one's own. So it must be admitted that, if there were no words in section 6 of Article X of the Constitution to limit the scope of that part of the section which we have just quoted, a married woman would have the same dominion over her separate estate and property as if she were a *feme sole*. But there are such words of limitation, and how and to what extent they restrict the right of alienation is the difficult and delicate question presented for solution. After exempting her property from any debt, liability or obligation of her husband, it is provided that she may devise and bequeath the same. This power is absolute. She may will her property with the same freedom as if she were unmarried or *sui juris*. And by the last provision of the act she may, with the written assent of her husband, "convey" her property as if she were a *feme sole*. A correct analysis of this section brings us to this conclusion: That a married woman may dispose of her property in any way she may see fit to do so, except that when she conveys it the written assent of her husband is essential to the validity of her conveyance. But what is meant by the word "convey?" The act by which she passes to another the title to her property must in law be a conveyance. Discussing a kindred subject in *Kelly v. Fleming*, 113 N. C., at page 138, this Court, by *Mr. Justice MacRae*, says: "The word 'convey' in its broadest significance might embrace any transmission of

possession, but we are restrained to its legal meaning, which, ordinarily speaking, is the transfer of property from one person to another by the means of a written instrument and other formalities. Rapalje & Lawrence Law Dict., 'Convey; Conveyance.' According to Webster a conveyance is 'an instrument in writing by which property or the title to property is conveyed or transmitted from one person to another.' The meaning of this word being well understood at common law, it must be understood in the same sense when used in a statute. *Smithdeal v. Wilkerson,* 100 N. C., 52." A conveyance is "an instrument in writing under seal (anciently termed an 'assurance') by which some estate or interest in lands is transferred from one person to another; such as a deed, mortgage," etc. Black's Law Dict., page 273, citing 2 Blackstone. In *Pickett v. Buckner,* 45 Miss., 245, the Court, in construing the dower act of that State, says: "In employing the term in the dower act, 'conveyance,' or 'conveyed,' we suppose that the Legislature meant the sense in which the word is ordinarily used in our jurisprudence. It is a technical or quasi-technical word of precise and definite import. As defined by Bouvier (1 Law Dict., 346), 'conveyance' 'is the transfer of the title to land by one person to another.' The instrument itself is called a conveyance." In *Nickell v. Tomlinson,* 27 W. Va., 720, the word "convey" is thus defined: "But the language now used is probably just as open to criticism as the language used one hundred years ago. The language now used is: 'shall operate to convey from the wife her right of dower in the real estate embraced in the deed.' Now 'convey' means transfer the title of land from one person or class of persons to another. (See Bouvier's Law Dict., Vol. I, page 399). Clearly an inchoate dower interest is no title to land. It is no estate present or future, vested or contingent, and the term 'convey' can be properly used only when the transfer of some 'estate in land'

is spoken of." Again, the Court says: "Conveyance is a transfer of an estate in land from one person to another." In *Thompson v. Hart*, 58 App. Div. (N. Y.), at page 449, the Court, in construing the word "convey" with reference to its sufficiency as a legal term to pass personal property, said: "Manifestly the word 'convey' is inappropriate to the transfer of personal estate."

In *Klein v. McNamara*, 54 Miss., 105, the word "conveyance" is said to be a general word and "comprehends the several modes of passing title to real estate. It is defined to be the transfer of the title of land from one person, or class of persons, to another." *Lambert v. Smith*, 9 Ore., 193; *Edelman v. Teakel*, 27 Pa. St., 27. Defining the word in *Jenckes v. Court of Probate*, 2 R. I., 255, the Court says: "The term 'convey' is a technical term, long known or used in deeds conveying real estate." We believe all the lexicographers generally adopt as the definition of the word "convey" the transfer of the title to realty, and of the word "conveyance" the instrument by which this is done. Anderson's Law Dict., page 254; 1 Bouvier's Law Dict. (1897), page 434; 1 Rapalje & L. Law Dict., 289; Abbott's Law Dict., 284. Blackstone emphasizes the distinction between instruments used in the alienation of "real estate" and those by which personal property and effects are transferred. "The former," he says, "being principally such as serve to convey the property of lands and tenements from man to man are commonly denominated *conveyances:* which are either conveyances at common law or such as receive their force and efficacy by virtue of the *Statute of Uses*." 2 Blk., 309; and, speaking again of conveyances, he says: "The legal evidence of this transmutation of property are called *common assurances* of the kingdom, whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed." 2 Blk., 294, 295. Referring to this definition

of Blackstone, the Court, in *McCabe v. Hunter*, 7 Mo., 357, says: "It has been argued that there is nothing in our statute concerning conveyances which requires an instrument conveying lands to be sealed. The statute uses the word 'conveyance' to designate all the instruments conveying lands from one to another. Blackstone says deeds which serve to convey the property of lands and tenements from man to man are commonly denominated conveyances. 2 Blk., 309. We have seen that in England the word conveyance carries with it the idea of a sealed instrument. This word is used by our Legislature in the sense in which it is understood in England." But if the framers of the Constitution used the word "convey" in its widest sense as meaning transfer of property or the title to property from one person to another by means of a written instrument and other formalities, and its substantive "conveyance" as signifying the instrument itself by which the transfer is effected (*Pronty v. Clark*, 73 Iowa, 55), we do not think it can affect the result in this case. The word "convey" must still be restricted in its operation to such property as is by law required to be transferred by a written instrument. The words "convey and devise" are technical terms relating to the disposition of interests in real property. It would not be technically or legally correct to speak of *conveying* personal property by a verbal sale of it, or even by a writing, any more than it would be to speak of devising it by last will and testament, not that a draftsman may not use a technical word to express his meaning without intending that it shall be construed in its strictly technical sense, but in the absence of anything to clearly indicate that the word was not intended to have its commonly accepted meaning in the law, but was used in some other and different sense, we must adopt the legal definition of the word, because, in the first place, it must be presumed to have been used in that sense, and, in the second, because it

would be unsafe to reject that well-understood meaning for another, unless the latter had been most clearly manifested. And this principle should especially apply to constitutions and statutes, which are generally written by those learned in the law and are intended to declare what the law shall be. It must be assumed in such a case that the state of the law and the meaning of its technical terms at the time of the enactment was known, for we are required in construing written laws, especially those changing the common law, to consider the old law and, in comparing it with the new so as to gather the intent, words of well known legal signification must have the meaning thus attached to them by the law, and especially must they be understood in the sense which they have acquired by actual judicial interpretation, unless by such construction we defeat the intention which clearly and distinctly appears from some other part of the enactment or from its context. It may be added that the framer of section 6 of Article X of the Constitution must have been familiar with the meaning of technical or legal terms, for he made the proper distinction between the disposition of realty and the disposition of personalty by will when he used the words "devise" and "bequeath." It may fairly be assumed that he knew also that a writing was not essential to the transfer of personalty, and that when he used the word "convey" he intended it should have its technical meaning.

There is another reason why the restriction upon the wife's right of alienation should be confined to that kind of property which can be transferred only by a written instrument. Section 6 of Article X of the Constitution provides that a married woman's separate estate and property may be conveyed by her with the written assent of her husband as if she were unmarried. Property in things personal, generally speaking, may pass from one person to

another by mere delivery or by word of mouth. An unwritten sale or gift is quite sufficient for that purpose. This being so, can it be supposed to have been intended by that section to require that, in every case where the wife makes a sale or gift of her personal property by delivery or by word of mouth, however small or however inconsiderable in value the article of property may be, the husband must give his written assent thereto; or, to put the case more strongly, is it intended by that section that, if the wife wishes to sell or give to another her personal estate or any part of it, however small that part, she cannot do so by delivery or by word of mouth, a usual and immemorial method of transferring such property, but she must, in every instance, reduce the transfer to writing in order that her husband may assent in writing to it, and that without this kind of written assent a valid transfer cannot be made. Either one or the other of the two alternatives must be adopted, unless the restriction upon her right to convey her separate estate and property is held to apply only to her realty, or to property the title to which can pass only by a written instrument. It further appears from an examination of section 6 of Article X of the Constitution that it was not intended to vest in the wife merely the naked title or power to hold in her own name this "sole and separate estate and property" without any of the usual incidents of ownership and without the right of direct control or dominion over it, but it was manifestly the purpose that, as it was vested in her own right, it should become her sole and separate property as if she were a single female, subject only to the limitations of that section. It is an enabling provision of the law and should be construed in the spirit which prompted its enactment, and, as it authorized the wife to take and hold property to her sole and separate use without the interposition of a trustee, and has thus made her capable

of holding it by herself and for herself, independently of her husband, she should be adjudged to have the capacity of disposing of it, except in so far as she may be expressly or impliedly restrained. That this was the spirit and purpose of the law-makers is evidenced by the fact that she is given the absolute right to dispose of her estate by will, which is certainly something more than the naked right to own and possess it, and then she may also *convey* it. It is, therefore, perfectly clear that it was intended she should have the right of disposition, in one form absolutely, and, in another, under certain restrictions. As she is vested with her property, including the incidental right of disposing of it, *inter vivos*, subject only to one condition, it must follow that in all other respects her right of alienation is left free and unfettered. The expression of the one limitation upon this right is the exclusion of all others. When the law says that in one case she shall be under the restraint of her husband, it means necessarily that in all other cases she shall be free. We may well ask why should a wife be permitted to devise and bequeath her property real and personal, and be allowed to convey only her real estate. If the use of the word "convey" restricts the right of alienation to the real estate, as we have shown that it does, then as to the personal property she is left without the right of disposition, unless it was the intention to confer upon her a general power to dispose of her property, with the proviso that real estate should not be conveyed without the assent of her husband. There is no valid or sufficient reason for making any distinction between the right to dispose of real property and the right to dispose of personal property, which would deprive her of the latter right. We think the true meaning of section 6 of Article X is that a married woman may dispose of her property without the assent of her husband, except in those cases where a written instrument or conveyance is required

for that purpose. This construction of the Constitution seems to be strongly favored by the Court in *Withers v. Sparrow*, 66 N. C., 129. Referring to *Knox v. Jordan*, 58 N. C., 175, *Boyden, J.*, for the Court, says: "But the Court in that case seems unwilling to sanction the doctrine that, as to the separate estate of the wife, she was to be regarded as a *feme sole* in all respects as held in England and also in the State of New York. But however proper this unwillingness of the Court to recognize that doctrine might have been at the time of that decision, there can be no reason, since the adoption of our present Constitution, why the English and New York doctrine should not now be followed in our State." We understand the Court to mean that a married woman has under the Constitution the right to dispose of her separate estate in any manner, save in so far as she may be restricted to any particular method of alienation pointed out in that instrument, and not that she may contract generally so as to subject her separate estate at law to the payment of her debts, as would be the case if she were *sui juris*. We are not at all disposed to change or impair the doctrine so frequently announced by this Court with reference to the capacity of a married woman to contract. That question is not now directly before us. Nor do we think it necessary to disturb the principles established in *Frazier v. Brownlow*, 38 N. C., 237, 42 Am. Dec., 165; *Harris v. Harris*, 42 N. C., 111, 53 Am. Dec., 393; *Knox v. Jordan*, 58 N. C., 175, and more recently in *Pippen v. Wesson*, 74 N. C., 438; *Dougherty v. Sprinkle*, 88 N. C., 300; *Flaum v. Wallace*, 103 N. C., 296, and *Farthing v. Shields*, 106 N. C., 289, and still more recently in *Harvey v. Johnson*, 133 N. C., 352. Our decision of the question involved in this case does not conflict with what this Court has so often said, and which is thus clearly stated by *Ruffin, J.*: "At law a *feme covert* is incapable of making a contract of any sort,

and any attempt of hers to do so is not simply voidable, but absolutely void. If, however, she be possessed of separate property, a court of equity will so far recognize her agreement as to make it a charge thereon. But even in that case, and in that court, her contract has no force whatever as a personal obligation or undertaking on her part. Nor was there any change wrought in this particular by the alterations made in our court system under the Constitution of 1868, or by the adoption of the statute known as the 'Married Woman's Act.' It was in reference to those very alterations, and the effect of the statute, that the Court declared in *Pippen v. Wesson,* 74 N. C., 437, and *Huntley v. Whitner,* 77 N. C., 392, *that no deviation from the common law had been produced thereby as respects either the power of a feme covert* to contract, in the nature of her contract, or the remedy to enforce it; that as a contract remedy her promise is still as void as it ever was, with no power in any court to proceed to judgment against her *in personam." Dougherty v. Sprinkle,* 88 N. C., 304; *Flaum v. Wallace,* 103 N. C., 296. The Constitution does not remove the incapacity which prevents a married woman from contracting debts or pecuniary obligations. So far as her power to thus contract is concerned, the disability of coverture remains as it was at common law, except where changes have been made by statute. In this connection the language of the Court in *Pippen v. Wesson,* 74 N. C., at page 445, is appropriate: "We conceive that while it would be beyond the power of the Legislature to destroy or alter the essential qualities of the separate estate given by the Constitution, as by giving the personal property to the husband, by making the property liable for his debts or by destroying the wife's power of disposition; yet it is within its power to regulate the manner in which the separate estate shall be held, to prescribe what contracts and what dispositions of their estates, other than

those specifically authorized by the Constitution, married women may make, and by what forms and ceremonies all their contracts shall be made and authenticated, and their free consent thereto ascertained. The Legislature may abolish all the incapacities of married women, and give them full power to contract as *femes sole*. The question is, has it done so?"

In what respect the method of charging in equity a married woman's separate estate with liability for her agreements may be affected, if at all, by this decision, is not now presented for our consideration. We simply hold that without the assent of her husband she may dispose of any of her property, unless the law requires the disposition of it to be evidenced by a conveyance or a writing.

It is argued that the case of *Walton v. Bristol,* 125 N. C., 419, is at variance with the conclusion we have reached, but we do not think so. The conflict, if there is any, is more apparent than real. The note in that case, which belonged to the wife, was endorsed by her alone and deposited by her with the Piedmont bank as collateral security for her husband's indebtedness to that bank. His indebtedness having increased to the amount of $3,000, an arrangement was made by which the husband borrowed to the amount of his indebtedness from the Wilmington bank and gave his note to that bank for the loan, and with the proceeds realized on his note to the Wilmington bank he paid the debt due the Piedmont bank, which bank had endorsed his note to the Wilmington bank for his accommodation, upon an agreement with him that the note for $1,250 should be deposited with it as collateral security or indemnity for its endorsement, and the husband so notified the Wilmington bank by letter both before and after that bank loaned him the $3,000. The wife did not assent to and, so far as appears in the case, had no knowledge of this new arrangement. Upon these

facts, it is clear, we think, that as the wife could only be liable as surety for her husband by reason of the endorsement and deposit of her note at the bank (*Purvis v. Carstarphen*, 73 N. C., 575; *Trust Co. v. Benbow*, 135 N. C., 303; *Fleming v. Barden*, 126 N. C., 459, 78 Am. St. Rep., 671: 53 L. R. A., 316; 127 N. C., 214, 53 L. R. A., 316) the change in the arrangement fully discharged her, whether it be regarded as an extension of the time of payment to her husband, as a novation of the debt or as a payment of the debt and an extinction of her liability, the last being the correct view, as we think. If the wife did not assent to the agreement by which her note was to be retained by the Piedmont bank as indemnity against any loss resulting from its endorsement of her husband's note to the Wilmington bank, and could not, in any view of the matter, be bound thereby, why inquire whether her endorsement of the note was valid and binding upon her? The endorsement had been virtually cancelled and nullified by the payment of the note due the Piedmont bank, whether it was originally valid or not, and the Court so treated it, for it says, "The wife never assented to the new arrangement," and was, therefore, not bound. The question as to the validity of her endorsement was not in the case, but, if it was, we would not be inclined to follow the decision in so far as it conflicts with the conclusion which we have reached in this case. The question was not presented in *Rawls v. White*, 127 N. C., 20, which is also cited for the plaintiff.

But the plaintiff's counsel, in his well-prepared brief, insists that the point was decided in this case when it was here on a former appeal, 128 N. C., 425, and also on the rehearing of that appeal, 130 N. C., 70, and that it is *res judicata* and has become the law of the case whether the decision was right or wrong. We may admit the general proposition that the decision of a court of final resort upon

a given state of facts becomes the law of the case upon a second trial and another appeal in regard to those facts, if they are substantially the same as those upon which the former decision was made; and yet, with that principle conceded, we do not think the question we are now considering has been finally adjudicated as between the parties to this suit so as to foreclose any further discussion of it and make any expression in either of the former opinions upon that question, whether correct or not, the law of the case. An examination of the record in the first appeal will show that the only question presented and upon which the decision therein could have been made, was whether the defendant's possession of the note raised a presumption that he was the lawful holder of it or, to speak more accurately, raised a presumption that the note had been paid. In passing upon this question it could make no difference whether the note had been legally endorsed to defendant by his mother or not, for if it had not been, he would still be entitled to the benefit of the presumption raised by the law from the fact of his possession of the note. When this Court decided with him in regard to the presumption, it was not necessary to consider the other question as to the legal effect of the endorsement of his mother even if it had been presented in a way to call for an adjudication of this Court upon it. We have, therefore, concluded that the question as to the validity of the endorsement of the note by the defendant's mother to him is now open for our consideration.

The question as to the right of a married woman to dispose of her personal property without the written consent of her husband is directly and squarely presented in this case by the defendant's request for instructions and the charge of the Court to which exception was taken, and it is the first time, as we think, that it has been so presented.

Having held that the transfer of the note by his mother

to the defendant was valid, it follows that the Court erred in refusing to give the instruction requested by the defendant and in giving the instruction to which he excepted: because if the endorsement and delivery of the note to the defendant constituted a valid gift of it to him, the fact that the jury have found that he did not have possession of the note at the time of his father's death should not defeat his title to it acquired by the gift, as the defendant may be able to show that even if his father had possession of the note at the time of his death, and there is therefore a presumption in favor of plaintiff, he is himself the real owner of it by virtue of the gift from his mother. This is a question for the jury to decide upon all the facts of the case and under proper instructions from the Court, and by holding that defendant acquired no title to the note by his mother's endorsement, the Court deprived him of the use of that important fact in developing his defense.

The error thus committed entitles the defendant to another trial.

New Trial.

MONTGOMERY, J., dissenting. I still am of the opinion that the law on the subject of the right of a married woman to dispose of her separate estate, whether it consists of real or personal property, was properly decided in the case of *Walton v. Bristol,* 125 N. C., 419. The opinion in this case overrules that case. In *Walton v. Bristol, supra,* the Court said: "The Constitution, as we have seen, so far as the wife's power to convey her separate estate is concerned, makes no difference between *real* property and *personal* property. If she undertakes to convey either species of property, the written assent of her husband must be had." Article X, section 6, of the Constitution is in these words: "The real and personal property of any female in this State, acquired before

marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried."

It will be seen from reading that section of the Constitution that the words "real and personal property" are always associated, and that the copulative conjunction "and," leading the last clause, connects both real and personal property with the mode of conveying them. If inconveniences arise practically in the disposition of small articles of personal property by the wife, the written assent of the husband being required, the difficulties are created by the section of the Constitution above quoted, and this Court cannot dispense with them. I can add nothing to what I said for the Court in *Walton v. Bristol, supra.*

CREECH v. COTTON MILLS.

(Filed June 1, 1904).

1. NEGLIGENCE—*Contributory Negligence—Nonsuit—Personal Injuries—Sufficiency of Evidence.*

In this action to recover for injuries from unboxed cog-wheels the trial judge properly refused to nonsuit the plaintiff.

2. NEGLIGENCE—*Contributory Negligence—Personal Injuries.*

In an action by an operative in a mill for personal injuries the plaintiff cannot recover unless she exercises that care which an ordinarily prudent person would or should have exercised.

ACTION by M. L. Creech against the Wilmington Cotton Mills, heard by *Judge George H. Brown* and a jury, at October Term, 1903, of the Superior Court of NEW HANOVER County. From a judgment for the plaintiff the defendant appealed.

J. D. Bellamy and *Herbert McClammy*, for the plaintiff.
Iredell Meares, for the defendant.

DOUGLAS, J. This is an action for personal injuries sustained by the plaintiff through the alleged negligence of the defendant in failing to box certain cog-wheels. The plaintiff was operating four looms, the filling for which was ordinarily provided by a boy whose duty it was to bring it to the looms. When the looms got out of filling and the boy failed to bring it around in time, the girl tending the loom sometimes went after it. She was not required to do so by the rules, but it was frequently done and permitted to be done. On the occasion of the accident the plaintiff went to get the necessary filling from a box which had been left in its usual place in a passage way in front of certain unboxed cog-wheels. In bending over to reach down into the box, her clothing was

caught by the cog-wheels and wound up tightly, so that she was drawn down upon the wheels and injured. This, and more, the plaintiff's evidence tends to prove; and hence there was no error in the refusal to nonsuit. In fact, as the case is now presented to us, we find but one exception that can be sustained. The defendant asked the Court to charge "That if the jury find that when this plaintiff went to get the filling from the box she failed to exercise that care which an ordinarily prudent person would or should have exercised, and because of this want of care, was injured, then the plaintiff contributed by her own negligence to her own injury, and cannot recover in this action." This prayer was refused by the Court. In this we think there was error, and that the defendant's prayer, as stated above, should have been given. We are not disposed to modify in the slightest degree our decisions holding that it is the duty of the master to furnish safe machinery, for which it is not necessary to cite authorities. There was no defect in the looms tended by the plaintiff, nor was she injured by them. The cog-wheels were not in her charge, nor was she compelled to work with them or even to go near them unless she saw fit. If she preferred to go after the filling instead of letting her looms remain idle, she should have exercised the care of an ordinarily prudent person. A failure to do so would, under such circumstances, be contributory negligence. As there was some evidence tending to show that she did not exercise such care, the issue should have been left to the jury.

New Trial.

McNEILL v. RAILROAD CO.

(Filed June 1, 1904).

1. CARRIERS—*Passes—Contracts.*

The conditions endorsed on the back of a pass that has expired or that is illegally issued have no legal effect whatever, even if otherwise valid.

2. CARRIERS—*Passengers—Contracts.*

The rights, privileges and protection attaching to the relation of a passenger are imposed by law upon common carriers upon considerations of public policy, independent of contract, and arise from the nature of their public employment.

3. CARRIERS—*Passengers—Acts 1891, ch. 320, sec. 4.*

A gratuitous passenger is not *in pari delicto* with the common carrier under sec. 4, ch. 320, acts 1891.

Petition to rehear this case, reported in 132 N. C., 510.

W. J. Adams, U. L. Spence, J. D. McIver, Douglas & Simms and *Shepherd & Shepherd,* for the petitioner.

Guthrie & Guthrie, Muchison & Johnson and *F. H. Seawell,* for the defendant.

Douglas, J. This is a rehearing of the case originally decided in 132 N. C., 510, 95 Am. St. Rep., 641. We fully concur in our former opinion as to the illegality of the contract by which the defendant agreed to give to the plaintiff free personal transportation to an unlimited extent in consideration of certain advertising. The only ground on which we allow the petition is that the plea *in pari delicto,* applying solely to the contract of carriage, is not a defense to an action for personal injuries caused by the negligence of the defendant.

The plaintiff testified as follows: "Marshburn called on me for my ticket. I told him I had a pass for 1899, and showed it to him, and told him I would pay the regular fare if he wanted it. He said it was all right. I was the editor of the *Carthage Blade,* a newspaper published at Carthage. In 1889 I made a contract with the defendant to publish its time-table in my paper as the consideration for the pass. I

did publish the time-table, and the defendant agreed to contract and renew the pass for 1900. The contract was not in writing."

The superintendent of the defendant company testified that there was no such contract, but that the pass was a gratuity. This raised a question of credibility which, in the view we take of the case, becomes of no practical importance. In any event, it would be a question of fact for the jury. The contract for transportation was rendered absolutely void by the statute, founded upon public policy, whether based upon no consideration or upon the inadequate consideration of printing a time-table. The pass issued in pursuance of an alleged contract, and for the purpose of carrying out its unlawful purpose, inherits its invalidity. The defendant was free at all times to decline to carry the plaintiff except upon the payment of the usual fare, and to eject him from its train upon his refusal to pay. The fact that the pass had expired makes no difference, as in its character as a contract it never had any legal existence. Being without legal existence, it was equally void of legal effect; and conferring no rights upon the plaintiff, imposed upon him no obligations which the law will enforce. A void contract is thus defined in Lawson on Contracts, section 350: "A void contract is one destitute of legal effect. It is a mere nullity and good for no purpose whatever. It is binding upon neither party and may be attacked as invalid by strangers. It does not require any disaffirmance to avoid it, but may be simply disregarded and it cannot be ratified and made valid."

The pass itself being worthless, the conditions on the back thereof could have no application. They were not independent contracts, and if they had been, were totally wanting in a legal consideration. Therefore this case does not come within the principle laid down in *Railroad v. Adams*, 192 U. S., 440, where the pass was recognized as a lawful and valid con-

tract for free transportation. By citing and distinguishing that case, decided by a divided court, we do not mean to express our approval of its argument or conclusion. It is not necessary for us to consider it in the case now before us.

We may here repeat that it is not the unlawful contract for free transportation which renders a railroad company liable to the penalty, but it is the transportation itself. In the view of this statute a free pass is a mere incident, as the same result could be obtained by issuing a thousand-mile ticket or one in ordinary form. The offense consists in the free carriage of a passenger, whether with or without a pass or ticket; and the offense is complete when such passenger is carried any appreciable distance. The railroad company may have issued to him a free pass or ticket from Raleigh to New York with impunity, but would become liable to the full penalties prescribed by the statute as soon as it had transported such passenger to the first station out of Raleigh. In using the term "free transportation," we mean to include all transportation which justly comes within the forbidden principle of discrimination. A mere colorable consideration will neither evade the penalties of the statute upon the one hand nor confer any rights upon the other.

We must bear in mind that while the statute renders absolutely void any contract for free transportation, so that neither party thereto can acquire any rights thereunder, it imposes the penalty only upon the transportation company. The act of free transportation alone is criminal. The party accepting such transportation is not guilty of a criminal act, whatever moral blame may attach to the reception of unlawful favors. Therefore, in contemplation of law, the parties cannot be considered *in pari delicto*. This difference is well expressed by *Pearson, J.*, speaking for the Court in *Melvin v. Easley*, 52 N. C., 356. That was an action for deceit and false warranty in the sale of a horse on Sunday by a horse-

trader, in violation of Rev. Statutes, chapter 118, section 1. The Court says, on page 358: "It is said that the plaintiff knew the defendant was a horse-trader and concurred in his violation of the statute, and, consequently, was *particeps criminis*. Does this consequence follow? In crimes, there are accessories; in misdemeanors, all who aid or concur are held to be equally guilty, and are subject to like punishment with the party who commits the offense. This plaintiff is not guilty of violating the law, and is not subject to a penalty, so he cannot be *particeps criminis* in the legal sense of the terms. He is not *in pari delicto*, and it is against the policy of the law and will defeat its object so to consider him. The Court will not aid any person who violates the law; therefore, the defendant could not maintain an action. This rule is adopted on the ground of policy, for the purpose of preventing a violation of the law, and if confined in its operation to the actual offender its application will be salutary, but if it be extended to the party who is not an offender, so far from checking it will encourage a violation of it by letting it be known to 'horse-traders,' 'shop-keepers' and 'all whom it may concern,' that they may cheat with impunity, provided always, it may be done on the Lord's Day."

The plaintiff was lawfully upon the defendant's train, and testifies that he offered to pay his fare if required by the conductor. The conductor permitted him to ride free, not as a personal favor to him, but in furtherance of a contract between him and the company itself acting through its superior officers. There is no suggestion that the plaintiff was seeking to defraud the company in any manner or that there was any collusion between him and the conductor. He was in every respect a *bona fide* passenger, and entitled to all the protection incident thereto unless deprived thereof by the acceptance of free transportation.

The cases relied on to sustain the defense of *in pari delicto*

are chiefly of two classes, those involving a violation of the Sunday laws, and those growing out of the relation of the plaintiffs towards the national government during the Civil War. The latter class, evoked from conditions now happily passed away forever, furnishes no criterion for the determination of the case at bar. It is enough to say that in both classes of cases the plaintiffs were actually engaged in the performance of an act expressly denounced as criminal by the law of the land as construed by the courts in which the actions were necessarily brought. Following are illustrative cases: *Turner v. Railroad,* 63 N. C., 522; *Martin v. Wallace.* 40 Ga., 52; *Wallace v. Cannon,* 38 Ga., 199, 95 Am. Dec., 385; *Railroad v. Redd,* 54 Ga., 33; *Connolly v. Boston,* 117 Mass., 64, 19 Am. Rep., 396; *Smith v. Railroad,* 120 Mass., 491, 21 Am. Rep., 538; *Lyons v. Desotello,* 124 Mass., 387; *Holcomb v. Danby,* 51 Vt., 428.

While entertaining the highest respect for the Lord's Day, the Sunday of the new law, we have not deemed it our duty to enforce its observance, so as to make it the shield of wrong. *Rodman v. Robinson,* at this term.

In the case at bar the plaintiff is certainly neither a tramp nor a trespasser, as both those terms imply an unlawful presence against the will of the owner. Hence it is needless to examine the cases dealing with such relations.

If the plaintiff's evidence be true, he was not a gratuitous passenger in the full sense of the term, inasmuch as he printed in his paper the schedule of trains in consideration of his otherwise free carriage. This was an inadequate consideration which rendered the contract void as an unlawful discrimination, but it was none the less a consideration of some actual value. But while this might, as between the plaintiff and the defendant, bring the case within the principle of *Railroad v. Lockwood,* 17 Wall., 357, we deem it

proper to treat the plaintiff as a gratuitous passenger, in view of the unlawful consideration, and will cite the able opinion in that celebrated case only in so far as it relates to this view of the case at bar.

It is often said that one becomes a passenger by virtue of a contract. This is not always so. A contract is a voluntary agreement between two parties, a coming together of two minds to a common intent, and yet a passenger may become such without a contract and indeed against the will of the carrier. A common carrier has no right to refuse a passenger without sufficient reasons, and such reasons so rarely occur and are so exceptional in their nature as to vary the general rule too slightly for practical consideration. Suppose the carrier without legal excuse should refuse to sell a ticket to one having the *bona fide* intention of becoming a passenger, and that the passenger should then enter the carrier's train in an orderly manner, take his seat in the proper car and tender his fare to the conductor, would the refusal of such fare deprive him of his legal status as a passenger? Assuredly not. He would be a passenger in the fullest meaning of the term, entitled to all the rights, privileges and protection attaching to that relation; and yet there would be no actual contract between him and the carrier. But it may be said that the law raises an implied contract. Even if we accept that form of expression, it simply means that the law imposes upon a common carrier certain duties and liabilities which adhere to the nature of his calling. We prefer to adopt the more direct expression, and say that those duties and liabilities are imposed by law upon common carriers upon considerations of public policy independent of contract and arise from the nature of their public employment. Contracts may be made with the carrier, but into all such contracts certain conditions are written by the hand of the law. One such condition is the inherent liability of the carrier for all

injuries proximately resulting from its own negligence or that of its servants.

But as we have already said, in the case at bar there was no legally existing contract, which is equivalent to saying there was no contract at all.

Viewing the plaintiff as a gratuitous passenger, and it appearing from the verdict that he was injured through the negligence of the defendant, we think that he is entitled to recover.

We have given this case most careful consideration, and have examined a very large number of authorities, but will cite those only which directly bear upon the case in the view we take of it, omitting needless repetitions from the same State. Neither time nor space will permit the discussion of cases having no essential relation to that at bar.

It is significant that the greater weight of authority is to the effect that a passenger may recover for injuries received from the negligence of a common carrier or its servants even when unlawfully traveling on Sunday or on a lawful pass with conditions endorsed thereon releasing the carrier from all liability. In both cases the cause of action is attributed to injuries resulting from the breach of a public duty. *A fortiori*, the plaintiff can recover for such negligence when the defendant alone is in the commission of an unlawful act and when there is no release of liability.

We will begin our citations from the Supreme Court of Pennsylvania, a Court which is not addicted to emotional jurisprudence, and has never shown any disposition to burden railroad management with unnecessary conditions or restrictions. In *Railroad v. Butler*, 57 Pa. St., 335, the intestate was killed while riding on a free pass on which a release was endorsed. *Sharswood, J.*, speaking for the Court says, on page 337: "The first error assigned has been properly abandoned, as it is too well settled to be now controverted

that a stipulation by a common carrier that he shall not be liable for damages does not relieve him from responsibility for actual negligence by himself or servants." This case is cited with approval upon the same point in *Burnett v. Railroad*, 176 Pa. St., 45, the latest case upon the subject.

In *Carroll v. Railroad*, 58 N. Y., 126, 17 Am. Rep., 221, where the plaintiff was traveling on Sunday contrary to the statute, it was held that: "The duty imposed by law upon the carrier of passengers to carry them safely, as far as human skill and foresight can go, exists independently of contract. For a negligent injury to a passenger an action lies against the carrier, although there be no contract, and the service he is rendering is gratuitous; and whether the action is brought upon contract or failure to perform the duty the liability is the same. One violating the statute prohibiting travel upon Sunday (1 R. S., 628, section 70), is not without the protection of the law. The carrier owes to him the same duty as if he were lawfully traveling, and is responsible for a failure to perform it the same in the one case as in the other."

The Court says, pages 133, 154: "But we deem it unnecessary to decide the question, which was argued with great ability by counsel, touching the liability of the defendant in the action, treating it as founded upon the contract between the parties. The gravamen of the action is the breach of the duty imposed by law upon the carrier of passengers to carry safely, so far as human skill and foresight can go, the persons it undertakes to carry. This duty exists independently of contract, and although there is no contract in a legal sense between the parties. Whether there is a contract to carry, or the service undertaken is gratuitous, an action on the case lies against the carrier for a negligent injury to a passenger. The law raises the duty out of regard for human life, and for the purpose of securing the utmost vigilance by carriers

in protecting those who have committed themselves to their hands. The liability of the carrier is the same whether the action is brought upon contract or upon the duty, and the evidence requisite to sustain the action in either form is substantially the same, and when there is an actual contract to carry it is properly said that the liability in an action founded upon the public duty is co-extensive with the liability of the contract. This case, therefore, is not within the principle of many of the cases cited, which forbid a recovery upon a contract made in respect to a matter prohibited by law, or for a cause of action which requires the proof of an illegal contract to support it."

In *Railroad v. Trautwein*, 52 N. J. L., 169, 7 L. R. A., 435, 19 Am. St. Rep., 442, it was held that the plaintiff could recover although unlawfully traveling on Sunday, the Court saying, on pages 171, 172: "A contract to carry made on Sunday, or to be performed on Sunday, is, by force of the statute, illegal and void. No action could be maintained for the breach of such a contract, nor for services performed under it, where the right of action rests exclusively upon a contract, express or implied. It is also clear that a plaintiff will fail where, to make a cause of action, he is compelled to rely upon an illegal contract. But the duty of persons engaged in these public employments to safely carry is independent of contract. It is a duty imposed by law from considerations of public policy, and arises from the fact that persons or property are received in the course of the business of such employments. Nor was the plaintiff's violation of the Sunday law, in a legal sense, the cause of her injury. It was only the occasion for an injury by the defendant's wrongful act, and hence her wrong-doing did not contribute to the injury in such a sense as to deprive her of her right of action; it was merely a condition and not a contributory cause of the injury."

In *State, use of Abell, v. Railroad*, 63 Md., 433, it was held that: "When a carrier undertakes without any special contract to carry a passenger gratuitously, the passenger is entitled to the same degree of care as if he had paid his fare." The Court says, on page 443: "The principle announced in this decision, that the duty of the carrier to convey safely, does not result from the consideration paid, but is imposed by law, has been recognized by this Court on the motion to re-argue the case of *Baltimore City Pass. Ry. Co. v. Kemp and Wife*, 61 Md., 619, 480 Am. Rep., 134, where the Court says that a common carrier who accepts a party to be carried owes to that party a duty to be careful irrespective of contract, and this Court illustrates the principle by the example of a child for whom no fare is charged but who would recover in case of injury the result of negligence."

In *Lemon v. Chanslor*, 68 Mo., 340, 30 Am. Rep., 799, a gratuitous passenger injured by the breaking down of a hack was allowed to recover. The Court says, on page 357: "This, we think, was sufficient to authorize the instruction. The principle announced in it, that although plaintiff might have been a gratuitous passenger such fact constituted no defense, is supported by all the authorities which have come under our observation. While in some of them intimations are made that in the case of a gratuitous passenger the carrier may only be liable for gross negligence, it has not been held in any of them that such fact would exempt the carrier from all liability. On the contrary, the weight of authority favors the doctrine of holding the carrier of passengers to the same degree of diligence in all cases where one has been received as a passenger, on the principle that if "a man undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence."

In *Jacobus v. Railway*, 20 Minn., 125, 18 Am. Rep., 360,

it was held that the plaintiff could recover although riding on a pass, as the same degree of care was required of the common carrier as if the plaintiff had been a passenger carried for hire. The Court says, on page 129: "In the case at bar, however, the plaintiff was not merely a gratuitous passenger, *i. e.*, a passenger carried without payment of fare or other consideration. He was a passenger upon a free pass expressly conditioned that the defendant should not be liable to him for any injury of his person while he was using or having the benefit of such pass. Does this circumstance distinguish his case from that of a merely gratuitous passenger?" * * * "There are two distinct considerations upon which the stringent rules as to the duty and liability of carriers of passengers rests. One is a regard for the safety of the passenger on his own account, and the other is a regard for his safety as a citizen of the State. The latter is a consideration of public policy growing out of the interest which the State or government as *parens patriæ* has in protecting the lives and limbs of its subjects." * * * "So far as the consideration of public policy is concerned, it cannot be over-ridden by any stipulation of the parties to the contract of passenger carriage, since it is paramount from its very nature. No stipulation of the parties in disregard of it, or involving its sacrifice in any degree, can, then, be permitted to stand. Whether the case be one of a passenger for hire (a merely gratuitous passenger) or of a passenger upon a conditioned free pass, as in this instance, the interest of the State in the safety of the citizen is obviously the same. The more stringent the rule as to the duty and liability of the carrier, and the more rigidly it is enforced, the greater will be the care exercised and the more approximately perfect the safety of the passenger. Any relaxation of the rule as to duty or liability naturally, and, it may be said, inevitably, tends to bring about a corresponding relaxation of care

and diligence upon the part of the carrier. We can conceive of no reason why these propositions are not equally applicable to passengers of either of the kinds above mentioned."

In *Tibby v. Railway Co.*, 82 Mo., 292, the intestate was killed riding on a free pass on top of a cattle car. The plaintiff was allowed to recover, the Court saying, on page 300: "The contract of exemption from damages was properly excluded. A common carrier is not permitted to stipulate against its own negligence (citing cases). This rule, in its application to the carriage of passengers, has never been relaxed."

In *Opsahl v. Judd*, 30 Minn., 126, the plaintiff unlawfully traveling on Sunday was permitted to recover. The Court says, on page 128: "It is further contended that the deceased was, by accepting passage upon the steamboat, engaged in an unlawful act, and was *particeps criminis* with the defendants and their agents in violating the Sunday law. It is a sufficient answer to this objection that the defendants on that day occupied the relation of common carriers of passengers and their general obligation to use such care and diligence as the law enjoins is not limited by the contract with the passengers, nor with the person who engaged the use of the boat and the service of the crew for that day, but is governed by considerations of public policy. That the undertaking was unlawful does not touch the question. *Carroll v. Railroad*, 58 N. Y., 126; *Jacobus v. Railroad*, 20 Minn., 110. As remarked by the Court in that case, "any relaxation in the rule as to duty or liability naturally, and, it may be said, inevitably, tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier."

In *Rose v. Railroad*, 39 Iowa, 246, it was held, quoting the headnote, that: "The payment of fare is not necessary to create the relation of common carrier and passenger. A

railroad company was held to be liable for causing the death of a passenger by the negligence of its employees, notwithstanding he was at the time riding upon a free pass, upon which was a stipulation, signed by himself, releasing the company from all liability for injury to his person or property while using the same." In its opinion the Court adopts the language used in *Railroad Co. v. Derby,* 14 How., 483.

In *Russell v. Railroad,* 157 Ind., 305, 56 L. R. A., 253, 87 Am. St. Rep., 214, the release from liability given by a Pullman porter was held valid on the ground that he was not a passenger; but the Court uses the following language, on page 309: "The decisions of this State firmly establish that a common carrier of goods or passengers cannot contract with a customer for a release of the carrier from liability resulting from the latter's negligence" (citing cases).

The grounds upon which this prohibition rests are variously stated by the Court. It has been said that such exemptions are against public policy; that the public is interested in the exercise of care and diligence on the part of the carrier; that it is unreasonable for any person or corporation to contract for the privilege of being negligent, and that the public is concerned with the life and security of every citizen. The fundamental reason, however, for holding common carriers, such as the appellee, liable for the results of their negligence, notwithstanding contracts exempting them therefrom, is that the State has granted them privileges which they exercise for the benefit of the public: in return for these, the common carrier impliedly undertakes to use due care and diligence in the transportation of both goods and passengers. This being a main inducement for the grant of its special rights, the carrier cannot by any special contract rid itself of the burden of responsibility, which is one of the conditions of its creation. Were it permitted to escape liability by entering into exonerating agree-

ments, its position of advantage over its patrons would, in almost every instance, enable it to force from them such stipulations as it desired, and the object of the State in creating the carrier would be virtually defeated, the carrier thus being able to abandon the duty imposed upon it by the State. As said in the case of *Railroad v. Faylor,* 126 Ind., 126, at page 130: "A stipulation that the carrier shall not be bound to the exercise of care and diligence is in effect an agreement to absolve him from one of the essential duties of his employment, and it would be subversive of the very object of the law to permit the carrier to exempt himself from liability by a stipulation in his contract with a passenger that the latter should take the risk of the negligence of the carrier or of his servants. The law will not allow the carrier thus to abandon his obligation to the public, and hence all stipulations which amount to a denial or repudiation of duties, which are of the very essence of his employment, will be regarded as unreasonable, contrary to public policy, and therefore void."

In *Railroad v. Curran,* 19 Ohio St., 1, 2 Am. Rep., 362, at page 12, the Court says: "Carriers, of the class of the plaintiff in error, are creatures of legislation and derive all their powers and privileges by grant from the public. They are created to effect public purposes, as well as to subserve their own interest. They are intended by the law of their creation to afford increased facilities to the public for the carriage of persons and property, and, in performing this office, they assume the character of public agents, and impliedly undertake to employ in their business the necessary degree of skill and care. This obligation arises from the public nature of the employment, and is founded on the policy of the law for the protection of the persons and property of the public, which must of necessity be committed, to a very great extent, to the care of public carriers. * * *

It cannot be denied that pecuniary liability for negligence promotes care; and if public carriers in conducting their business can graduate their charges so as to discharge themselves from such liability, the direct effect will be to encourage negligence by diminishing the motives for diligence."

In *Davis v. Railway Co.,* 93 Wis., 470, 33 L. R. A., 654, 57 Am. St. Rep., 935, it was held: "A stipulation in a contract for the carriage of a passenger exempting the carrier from liability for injuries caused by its negligence or the negligence of its agents or employees is void as against public policy," the Court saying, on page 479: "It is very well established in this State that a contract for such an exemption from liability by a common carrier is void, as against public policy. The defendant could not, by any agreement, however plain and explicit, wholly relieve itself from liability for injuries caused by its negligence or the negligence of its agents or employees."

In *Railway Co. v. McGown,* 65 Texas, 640, it was held, quoting the headnotes, that: "A common carrier of passengers cannot by contract relieve itself from responsibility, or even limit its liability, for injuries to a passenger resulting from the negligence of itself or its employees, or agents, in the scope of their employment; and this is so with reference as well to passengers traveling free of charge as to those paying full fare. The liability of the carrier of passengers does not depend on the fact that compensation for the passenger has been paid to it, but the same degree of care is incumbent on the carrier in the case of a passenger traveling on a free pass as in the case of one paying full fare."

The Court says, on page 646: "The relation of passenger and carrier is created by contract, express or implied, but it does not follow from this that the extent of liability or responsibility of the carrier is, in any respect, dependent

on a contract. In reference to matters indifferent to the public, parties may contract as they please; but not so in reference to matters in which the public has an interest. For the purpose of regulating such matters, rules have been established, by statute or the common law, whereby certain duties have been attached to given relations and employments. These duties attach as matter of law, and without regard to the will or wish of the party engaged in the employment, or of the person who transacts business with him in the course thereof; and this is so for the public good. Duties thus imposed are not the subject of contract. They exist without it, and cannot be dispensed with by it. The violation of such a duty is a tort. The law declares that it is the duty of a public carrier of passengers to use the highest degree of care to insure their safety. Why was not this left to be settled by the contract of the carrier and passenger? Certainly for no other reason than that the employment itself was of such a nature as to make it a matter of public concern. None could be of greater public concern, at the present day, than these employments by which men, women and children are transported by millions by agencies of a most dangerous character and with a speed heretofore unknown."

In *Railroad v. Crudup,* 63 Miss., 291, it was held that a mail agent traveling on a "free ticket" could recover, the Court saying, on page 302: "The Court properly excluded the evidence proposed by the defendant to show that the deceased had accepted a 'free ticket' by which he relieved the company from liability for the negligence of its servants. By their contract with the government the company received compensation for transporting both the mail and its custodians, and there would have been no consideration for the obligation entered into by the deceased to waive damages, and in addition to this it may be added that such a contract

is against public policy; the duty which common carriers owe to all persons carried by it, viz., not to be guilty of negligent injury, is one against the breach of which they may not protect themselves by private contract."

In *Railroad v. Hopkins,* 41 Ala., 486, 94 Am. Dec., 607, the Court says: "We do hold, however, that it makes no difference whether the service is performed gratuitously or not, in regard to the obligation to perform it well, after it is once entered upon; for ever since the decision of the leading case of *Coggs v. Bernard,* 2 Smith's Lead. Cas., 82, it has been regarded as sound law that 'the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.' And we hold further, that in undertaking the performance of gratuitous transportation the common carrier can no more stipulate for exemption from liability for damage occasioned by the negligence, or willful default, or tort, of himself or his servants, than he can when he receives a reward for the service to be performed. Both are alike prohibited by a sound public policy, which also forbids a gratuitous bailee not bound by the considerations of public duty attached to the office of a common carrier from stipulating that he may be fraudulently negligent or safely dishonest. Railroad companies are incorporated in part, at least, from public considerations and for the public good. As carriers of persons and property it has been held they may be considered as acting in a public capacity and as a kind of public officers. The exercise of honesty, care and diligence by them or their agents and employees is a public duty resulting from their position, the obligation to perform which cannot be thrown off by contract. If thus thrown off the effect would be to relax or modify the performance of the duty and to promote a relaxation of proper care in the selection of agents and servants for its performance."

In *Waterbury v. Railroad,* 17 Fed. Rep., 671, it was held that: "The right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely. It suffices to enable him to maintain an action for negligence if he was being carried by the railroad company voluntarily, although gratuitously, and as a mere matter of favor to him."

Wallace, C. J., says, on page 672: "A careful examination of the evidence shows quite satisfactorily that the case did not justify the assumption in any aspect of it that the plaintiff was entitled to be carried as a passenger as an implied condition of the contract to carry his cattle. The most that can be fairly claimed for the plaintiff upon the evidence is that he was riding upon the engine permissively. If he was riding there with the consent of the defendant, express or implied, it is not material, so far as it affects the defendant's liability for negligence, whether he was there as a matter of right or a matter of favor, as a passenger or a mere licensee. It suffices to enable him to maintain an action for negligence if he was being carried by the defendant voluntarily. If the defendant undertook to carry him, although gratuitously, and as a mere matter of favor to himself, it was obligated to exercise due care for his safety in performing the undertaking it had voluntarily assumed. *Railroad v. Derby,* 14 How., 468; *Steamboat v. King,* 16 How., 469. The carrier does not, by consenting to carry a person gratuitously, relieve himself of responsibility for negligence. When the assent to his riding free has been legally and properly given, the person carried is entitled to the same degree of care as if he paid his fare. *Todd v. Railroad,* 3 Allen, 18, 80 Am. Dec., 49. As is tersely stated by *Blackburn, J.,* in *Austin v. Railroad Co.,* 15 Weekly Rep., 863, 'the right which a passenger by railway has to be carried safely does

not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely.'"

In *Railroad v. Derby,* 14 How., 468, it was held that a gratuitous passenger could recover, the Court saying, on page 484: "The liability of the defendants below for the negligent and injurious act of their servant is not necessarily founded on any contract or privity between the parties, nor affected by any relation, social or otherwise, which they bore to each other. It is true a traveler by stage coach or other public conveyance who is injured by the negligence of the driver has an action against the owner founded on his contract to carry him safely. But the maxim of '*respondeat superior,*' which, by legal imputation, makes the master liable for the acts of his servant, is wholly irrespective of any contract, express or implied, or any other relation between the injured party and the master. If one be lawfully on the street or highway, and another's servant carelessly drives a stage or carriage against him and injures his property or person, it is no answer to an action against the master for such injury, either that the plaintiff was riding for pleasure, or that he was a stockholder in the road, or that he had not paid his toll, or that he was the guest of the defendant, or riding in a carriage borrowed from him, or that the defendant was the friend, benefactor, or brother of the plaintiff. These arguments, arising from the social or domestic relations of life may, in some cases, successfully appeal to the feelings of the plaintiff, but will usually have little effect where the defendant is a corporation, which is itself incapable of such relations or the reciprocation of such feelings. In this view of the case, if the plaintiff was lawfully on the road at the time of the collision the Court were right in instructing the jury that none of the antecedent circumstances or accidents of his situation could affect his right to

recover." * * * "This duty does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous." "The confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it. (See *Coggs v. Bernard,* and cases cited in 1 Smith's Leading Cases, 95). It is true a distinction has been taken in some cases between simple negligence and great or gross negligence, and it is said that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference (if it be capable of definition), as the verdict has found this to be a case of gross negligence." "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of gross."

The citations of this celebrated case will be found in 5 Rose's Notes, pages 275, 284.

In *Steamboat v. King,* 16 How., 469, *Curtis, J.*, speaking for the Court, says, on page 474: "In *Railroad v. Derby,* 14 How., 486, which was a case of gratuitous carriage of a passenger on a railroad, this Court said: 'When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of gross.' We desire to be understood to

re-affirm that doctrine as resting not only on public policy but on sound principles of law."

In the celebrated case of *Railroad v. Lockwood,* 17 Wall., 357, than which there are few opinions more able or more widely cited and approved, it was held, quoting the language of the Court at the conclusion of its opinion on page 384, that:

"First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

"Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

"Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

"Fourthly. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

"These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire."

The plaintiff was traveling on what was called a drover's pass, which expressly stipulated that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The Court held that while the pass was professedly gratuitous on its face, it was in fact given as part of the original contract for shipping the cattle. The case is treated as a carriage for hire, but the reasoning of the opinion clearly applies to all classes of passengers. *Justice Bradley,* speaking for the Court, says, on

page 376: "It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and, therefore, may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract.

"We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest."

Again, the Court says, on page 377: "In regulating the public establishment of common carriers the great object of the law was to secure the utmost care and diligence in the performance of their important duties, an object essential to the welfare of every civilized community. Hence the common law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms."

And again, on page 381: "Hence, the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting

to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law."

The extent to which this case has been cited and approved will be shown by reference to 8 Rose's Notes, page 48.

In *Railway Co. v. Stevens,* 95 U. S., 655, the Court says, on page 660: "Since, therefore, from our view of the case, it is not necessary to determine what would have been the rights of the parties if the plaintiff had been a free or gratuitous passenger, we rest our decision upon *Railroad Co. v. Lockwood, supra.* We have no doubt of the correctness of the conclusion reached in that case. We do not mean to imply, however, that we should have come to a different conclusion had the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case, and it is often asked, with apparent confidence, 'May not men make their own contracts, or, in other words, may not a man do what he will with his own?' The question, at first sight, seems a simple one. But there is a question lying behind that: 'Can a man call that absolutely his own which he holds as a great public trust by the public grant and for the public use as well as his own profit?' The business of the common carrier, in this country at least, is emphatically a branch of the public service; and the conditions on which that public service shall be performed by private enterprise are not yet entirely settled."

In *Railroad v. Sullivan,* 120 Fed. Rep., 799, 61 L. R. A., 410, it was held that: "Riding in the coach set apart for colored passengers, contrary to the rules of the carrier and provisions of the statute, is not negligence on the part of a white person which will prevent a recovery for his death through the negligence of the carrier, although he would not have been injured had he not been in that coach."

In the earlier English reports the doctrine was uniformly

held that an action to recover damages for negligent injury by a common carrier arose from a breach of duty imposed by the common law and needed no contract to support it. In course of time, by some unexplained change of judicial sentiment, the courts began to recognize stipulations for release of liability, until finally common carriers were practically allowed to absolve themselves, by stipulation, from liability for all negligence, however gross. This led to the passage of the Act of 1854, called the "Railway and Canal Traffic Act," declaring that railway and canal companies should be liable for the negligence of themselves or their servants, notwithstanding any notice or condition, unless the judge or court trying the cause should adjudge the condition just and reasonable. The practical effect of this statute was to bring the law back to its original status. However, all the cases seem to hold that there is no implied release in the absence of written stipulations or fraudulent concealment of material facts. This is shown by the following cases, which are typical of others. In *Brotherton v. Wood*, 7 E. C. L., 345, the Court says, on page 348: "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that by their negligence or default no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it."

In *Marshall v. Railway Co.*, 11 C. B. E. C. L., 73, *Jervis, C. J.*, says, on page 661: "But, upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any contract between him and the company, but by reason of a duty implied by law to carry him safely." In the same case *Williams, J.*, says, on page

663: "I am of the same opinion. * * * It seems to me that the whole current of authorities, beginning with *Govett v. Radnidge* and ending with *Pozzi v. Shipton,* establishes that an action of this sort is, in substance, not an action of contract, but an action of tort against the company as carriers. That being so, the question is whether it was necessary to allege any contract at all in the declaration. The earliest instance I find of an action of this sort is in Fitzherbert's Natura Brevium, 'Writ de Trespass sur le Case,' where it is said (9b): 'If a smith prick my horse with a nail, etc., I shall have my action upon the case against him without any warranty by the smith to do it well; for it is the duty of every artificer to exercise his art rightly and truly as he ought.' There is no allusion there to any contract. That being so, it seems to me to follow that the allegation of a contract in a case of this kind is altogether unnecessary."

In *Austin v. Railway Co.,* 2 Q. B., 442, it was held that a child over the free age prescribed by statute, and having no ticket, and no fare having been asked or paid, could recover for injuries received. *Blackburn, J.,* concurring, says, on page 444: "I am also of opinion there should be no rule. I think that what was said in the case of *Marshall v. Newcastle and Berwick Railway Co.* was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely."

A large number of authorities could be cited in addition to those above, but it is needless to do so. We have already quoted at greater length than we should but for the fact that we wished to show, not simply the decision of the cases, but especially the essential principles by which those results were

reached. We will now close by citations from the leading text-books.

In 5 A. & E. Ency., 507, it is said: "The carrier is liable to persons whom it accepts for transportation over its line, and from whom it demands no fare, to the same extent that it is liable to passengers who pay fare. * * * A person riding on a free pass is as much a passenger as if he were paying full fare, and if the pass is given for a valuable consideration he is a passenger for hire. * * * The fact that the carrier is prohibited by law from issuing free passes does not render a person a trespasser who travels upon such a pass unlawfully issued to him. If the pass is unlawful, the conductor should demand the regular fare, and his failure to do so will not make the passenger a trespasser nor destroy his right as a passenger."

In 6 Cyc., 544, it is said that: "While it is no doubt true, as indicated in the definition, that public carriers of passengers are those who carry passengers for hire, there is not in the case of carriers of passengers a distinction as to liability between passengers carried for compensation and those carried gratuitously analogous to that recognized as to carriers of goods between cases where goods are carried for compensation and those where they are carried free. One who is accepted for transportation as a passenger, without any compensation to be rendered, is nevertheless entitled to all the care and protection which the carrier is under obligation to furnish to paying passengers."

In Lawson on Contracts it is said, in section 335: "A carrier of a passenger who has paid a consideration for his passage cannot exempt himself from liability for damages caused by his own negligence or that of his servants, by any contract which he may have induced his customer to approve. Such a contract is void as against the policy of the law, even though

the passenger is a gratuitous one, riding free and paying no fare."

In 2 Beach Mod. Law of Contracts it is said, in section 1502: "The weight of authority in this country favors the rule that a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law; and that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants."

In Fetter on Carriers of Passengers, section 220, it is said: "It is now well settled that a carrier, by its acceptance of a passenger as a passenger, comes under an obligation to take due and reasonable care for his safety, which obligation arises by implication of law, and independent of contract, so that it may exist though the contract of carriage is illegal, or though there is no express contract of carriage. Hence the fact that a contract of carriage is entered into on Sunday, and that plaintiff, when injured, was traveling on Sunday, in violation of a statute, does not preclude him from maintaining an action against the carrier for the injuries. In the language of the New York Court of Appeals, 'It is certainly a startling proposition that the thousands and tens of thousand of persons who travel on business or for pleasure on Sunday, upon railroads and steam and ferry boats in this State, are at the mercy of incompetent or careless engineers and servants, and that there is no remedy for loss of life or limb resulting from this negligence.' "

In Bishop on Non-Contract Law, section 1074, it is said: "Such, therefore, is both the policy of the law and the law itself, in the highest sense fundamental and unyielding. The result of which is that, in just legal reason, it will under no circumstances be competent for a railroad or other common carrier, whether of goods or passengers, to cast off this respon-

sibility by any resort to a by-law, to a usage, or even to an express contract with the party. Particularly in the carriage of passengers, if the road could by contract exempt itself from responsibility for its own negligence, its next step would be to refuse all passengers who would not enter into the contract; thereupon the railroad corporations, freed from the only motive to carefulness which they could appreciate, the danger of being muleted in damages, would conduct their business with a recklessness rendering travel a horror to every person not permitted to remain at home." See also, section 1076.

In Cooley on Torts, on page 826 (685), it is said: "Carriers of passengers, it is also held, cannot relieve themselves from the obligation to observe ordinary care by any contract whatsoever, even in the case of 'drovers' passes,' which are given without charge to those who accompany consignments of cattle, or in cases where free passage is given as mere matter of courtesy or favor." The learned authority then proceeds to say that, while there are certain exceptions permitted in two States, "the weight of authority is most distinctly the other way, both in this country and in England"; that is, in favor of the rule as stated above.

In Hutchinson on Carriers it is said, in section 566: "It is enough that the person is being lawfully carried as a passenger to entitle him to all the care which the law requires of the passenger carrier; and the same vigilance and circumspection must be exercised to guard him against injury when he is carried gratuitously, as upon what is known as a free pass, or by the carrier's invitation, as when he pays the usual fare." See also, sections 565 and 567.

In Wharton's Law of Negligence it is said, in section 355: "Is a free passenger to be placed in a different position, so far as concerns his rights to protection from neglect, from a pay passenger? This question, also, was at one time

answered in the affirmative; the courts being led astray by the mistaken view of mandates which will be hereafter pointed out. But there is now an almost uniform acquiescence in the true view that a person who undertakes to do a service for another is liable to such other person for want of due care and attention—*the diligentia of the bonus et diligens paterfamilias*—in the performance of the service, even though there is no consideration for such undertaking. Or, as the question is elsewhere put, the confidence accepted is an adequate consideration to support the duty. Eminently is this the case with what are called 'free' passengers on the great lines of common carriage. As has already been observed, there is, in such cases, not merely confidence tendered and accepted, but *some sort of business consideration, though this be a mere courteous interchange of accommodations.* For these and other reasons noted under the last head, the carrier is bound to exhibit the same diligence and skill towards passengers of this class as he is to passengers who pay money for their tickets."

Again the same author says, in section 354: "But if a trespasser take his seat openly in a carriage, in the place assigned to passengers generally, there is no reason why a different standard of care should be applicable to him than is applicable to other passengers. Waiving for the present the point elsewhere discussed, that even a trespasser, supposing him to continue such, is not withdrawn from the protection of that law which requires that no man shall negligently injure another, the carrier, if he permits such trespasser to continue in the carriage, cannot regard him, after such permission, as a trespasser. The carrier has a right to expel the trespasser at once from the carriage. If the carrier omits to do this, and if the person in question remains voluntarily with the carrier's assent, then the trespass passes into a *quantum meruit* contract of carriage. On the one side, the per-

son so entering the carriage is bound to the carrier for reasonable pay for the carriage. On the other side, the carrier is bound, from the time he assents thus to carry such person, to exercise towards him the diligence, prudence and skill of a good carrier in that particular kind of transport; in other words, the particular kind of diligence, prudence and skill which the carrier is bound to exercise towards all other passengers."

In Watson on Dam. for Personal Injuries it is said, in section 230, page 279: "At the outset it may be stated, as a general rule, that the mere fact that the plaintiff, at the time of the injuries received, is engaged in the commission of an unlawful act, is not sufficient to relieve the author of the wrong of liability in damages therefor. 'The question how far a person can defend an otherwise indefensible act,' it has been said, 'by showing a criminal or unlawful act on the part of the party injured, has of late years been fully discussed in the courts of this country and of England. The result generally reached is that no man can set up a public or private wrong committed by another as an excuse for a willful or unnecessary or even negligent injury to him or his property. This principle is defended on the grounds of morality and law, and it reaches and determines a great variety of cases.'" The same author further says, in section 238: "The liability of the owners of a steamboat for injuries to a passenger is not affected by the fact that the person injured was, at the time the injuries were received, engaged in an excursion with other passengers upon defendants' steamboat in violation of a statute prohibiting, is not, by reason thereof, without the protection of the law. The carrier owes him the same duty as if he were lawfully traveling, and is liable in damages for personal injuries resulting from a failure to perform it."

In section 231, the author adopts the language of an able and elaborate opinion by *Dixon, C. J.*, in *Sutton v. Wauwatosa*, 29 Wis., 27, 9 Am. Rep., 534, as follows: "Himself guilty of a wrong, not dependent on nor caused by that charged against the plaintiff, but arising from his own voluntary act or his neglect, the defendant cannot assume the championship of public rights, nor to prosecute the plaintiff as an offender against the laws of the State, and thus to impose upon him a penalty many times greater than what those laws prescribed. Neither justice nor sound morals require this, and it seems contrary to the dictates of both that such defense should not be allowed to prevail. It would extend the maxim, *ex turpi causa non oritur actio*, beyond the scope of its legitimate application, and violate the maxim equally binding and wholesome, and more extensive in its operation, that no man shall be permitted to take advantage of his own wrong. To take advantage of his own wrong and to visit unmerited and over-rigorous punishment upon the plaintiff, constitute the sole motive for such defense on the part of the person making it."

In 3 Thompson's Law of Neg., section 3326, it is said: "It is thoroughly settled in the American law that a common carrier of passengers cannot, by a contract with one who is a passenger for hire, relieve himself from liability for damages caused by the negligence of himself or his servants."

The same author says in section 3328: "The principle is well settled that a carrier owes the same duty of protection to a simply gratuitous passenger as to a passenger for hire."

In Buswell on Law of Pers. Injuries, the author, in laying down the rule that a breach of public duty is the foundation of the action for personal injuries, says in section 3: "The custom of the realm of England, long made a part of the common law, imposes upon common carriers of pas-

sengers certain public duties in respect of such passengers for a breach of which a passenger injured may have his remedy by an action of tort."

Again the author says, in section 116: "In the United States, the weight of authority is in favor of the rule that, as to passengers for hire, the stipulation by a common carrier that he will not be liable for damages in case of injury to the passenger, will not relieve him from responsibility for the results of the negligence of himself and his servants."

Again, the same author says, in section 117: "If a common carrier accepts a person as passenger, there being no contract to relieve the carrier from the legal consequences of his negligence in the case of accident, it is held generally, in the United States, that the carrier remains liable for such negligence, although the plaintiff was to be transported gratuitously. For, having admitted the plaintiff to the rights of a passenger, the defendant is not permitted to deny that he owes to him the duty which, as carrying on a public employment, he owes to all his passengers."

In 2 Parsons on Contracts, the author, after referring to various authorities, says, on page 222: "Whether a common carrier is liable to a passenger to whom he has given passage, and from whom he has, therefore, no right to demand fare, is not so certain; but he would certainly be liable for gross negligence, and probably liable for any negligence. He is certainly not excused by mere non-payment, unless payment has been demanded and refused. In note X it is said: "It is now quite generally held that for negligence there is the same liability to persons riding on free passes as to those who pay full fare."

In 2 Wood on Railroads, it is said, on page 1207: "In all cases where the company is required by law to carry a person free, or where he is riding free by the consent of the company fairly obtained, he is a passenger, and entitled to

all rights and privileges as such. In the case of a free pass, the carrier is under the same obligations as to care and vigilance as he is to a passenger for hire; and as to passengers to whom passes are given which are predicated upon any consideration, he cannot absolve himself from liability for injuries resulting from gross negligence by any notice to that effect printed upon the pass, as such conditions are against the policy of the law. It has been held, however, that when tickets or passes are purely gratuitous, the person receiving may by special agreement assume all risks of the journey incident to the mere negligence of the company."

In Whitaker's Smith on Negligence, while the text does not seem to treat the subject, there are full notes on page 309 showing that the rule is that a common carrier "must exercise the same care and attention in the transportation of gratuitous passengers as of those who have paid their fares, and is liable to the same extent for negligence." These authorities tend to show that this rule is generally held even in the face of express stipulations of exemption, and universally so in the absence of such stipulations.

In 4 Elliott on Railroads, it is said in section 1497: "The rule supported by the weight of authority is that a common carrier cannot by any kind of a contract exempt itself from liability as such for loss or injury occasioned by its own negligence or that of its servants. This rule 'rests upon considerations of public policy and upon the fact that to allow the carrier to absolve himself from the duty of exercising care and fidelity is inconsistent with the very nature of his undertaking.' The employment of a common carrier is a public one, and the fundamental principle upon which the law of a common carrier was established was to secure the utmost care and diligence in the performance of their duties. For this reason they are held to the extraordinary liability of insurers. To permit them to contract

against liability for their own negligence or that of their servants would be contrary to the whole spirit and policy of the law governing common carriers, and would, in effect, authorize them to abandon the most essential duties of their employment. When we also consider that the parties do not stand upon an equal footing and that railroad companies are given many special privileges as corporations for the very reason that they have such duties to perform for the public, there can be no doubt of the justice of this rule, especially as applied to such corporations."

The same author says, in section 1578: "We think it is safe to say that the general rule is that every one on the passenger trains of a railroad company and there for the purpose of carriage with the consent, express or implied, of the company, is presumptively a passenger. * * * Persons who pay a consideration for passage, no matter in what form, are generally regarded as passengers."

And again, in section 1004, he says: "The general rule is that a person riding on a railway train on a free pass, the possession of which was lawfully and rightfully obtained, is a passenger. The possession of the pass must be lawful for if it was obtained by fraud or the wrong of the person attempting to use it, he is not a passenger, and the carrier owes him no duty as such." And again in section 1606, he says: "But where the person riding on a pass is regarded as a passenger the carrier usually owes to him the same degree of care that it owes to a passenger paying full fare." Again, he says in section 1608: "Passes usually contain a stipulation which in terms exempts the carrier from liability for negligence. As to the validity of such stipulations the authorities are not agreed, some holding that they are valid and binding upon the persons using the pass, others that they are not. In the majority of the States the courts hold that such a stipulation is void and not binding upon the per-

son using the pass, and that the carrier is liable for injuries negligently inflicted upon a person using a pass containing such a stipulation."

Again he says, in section 1609: "The relation which the person using the pass bears to the railroad company is also an important element in determining the liability. If he is regarded as a passenger, then the company is bound to use the highest practical degree of care, and, for a failure to use such care, it will be liable for all injuries approximately caused thereby. But where the person using the pass is an employee, then the carrier will only be liable for such injuries as result from negligence in failing to perform the duties owing to such employees." * * * "The general rule is that where the holder of the pass is to be regarded as a passenger any act of negligence may give a right of action."

We cannot better close these citations than by the following clear and terse statement of the principles from 2 Shearman & Redfield on Negligence, which is fully sustained by the authorities we have examined. The eminent authors say, in section 491: "It is well settled that, in the absence of a special contract, a passenger traveling gratuitously has a perfect right of action for injuries suffered by him through the carrier's negligence. The fact that a traveler who ought to pay has not paid, and does not intend to pay his fare, does not, in the absence of actual fraud, deprive him of redress for injuries. There is no practical difference between the degree of care which a free passenger has the right to claim, and that to which a paying passenger is entitled."

To our minds these authorities, taken in connection with the cases cited in them, are conclusive of the questions before us. The greater weight of authority is decidedly in favor of the doctrine that a common carrier cannot in any event stipulate against its own negligence, including that of its servants; while it is overwhelming to the effect that, in the

absence of such stipulations, it owes to a gratuitous passenger the same degree of care that it does to those that pay. In the case at bar the plaintiff appears to have been a *bona fide* passenger, and was so recognized by the conductor in charge of the train. Both are conclusively presumed to have known that the contract for a pass was illegal and void; but there is no evidence that either acted in fraud or bad faith. There is evidence that the plaintiff gave some consideration, although legally inadequate; but in any event the worst position in which he can be placed is that of simply a gratuitous passenger. There were no existing stipulations of exemption between him and the defendant. None had ever existed except the conditions on the back of the pass. These conditions can have no effect because, in the first place, the pass had expired; and, secondly, had no legal existence before its expiration. A condition, like the leaf on a tree, must be attached to something from which it can draw its life and strength. By practically all the authorities, in the absence of such express conditions, the plaintiff is held entitled to recover. What would have been the legal effect of such conditions if they existed is not strictly before us. We have shown that the decided weight of authority is against their validity, but we did so to show that if the liability of a common carrier to a gratuitous passenger could not be waived by an express stipulation, it certainly existed in the absence of any such stipulation. Even those courts that hold it may be waived necessarily admit its existence in the absence of waiver. If it exists in the absence of contract and cannot be waived by contract, it must necessarily owe its existence to the policy of the law.

It is contended in behalf of the defendant that there was error in the Court below refusing to charge: "That there is no evidence to support the plaintiff's allegation (in the complaint) that he was traveling on the defendant's road,

on the occasion complained of, as a passenger for hire or compensation." We see no error in its refusal, as in our view of the case it was immaterial. The defendant also contends that its exception to the following charge of the Court should be sustained, to-wit: "If when the plaintiff was called on for his fare he produced to the conductor the pass which had been exhibited in evidence, and the conductor accepted it, the plaintiff was a passenger on the train."

We think that whatever error may be found in this instruction is harmless. The pass was in legal effect a blank piece of paper. It had expired by its own limitation, if that can be said to have expired which has never legally existed. Its only effect could have been to convince the conductor of the truthfulness of the plaintiff's statement that he had a contract with the company under which he was entitled to ride free. The result seems to have been his acceptance as a passenger by the conductor who, being in control of the train, is in the very nature of things the only officer or servant of the company who can accept a passenger. He is charged with that duty by the defendant, who must therefore abide the consequences of his act, especially as there is no evidence of fraud or deception on the part of the plaintiff. The evidence tends to prove that the plaintiff was on the train as a *bona fide* passenger under an agreement for so-called free transportation, but ready to pay his fare if demanded. The fact that the previous contract was illegal, and no fare was either demanded or paid, can have no further effect than to reduce the plaintiff to the condition of a merely gratuitous passenger, having no binding contract and therefore subject to no limitations of liability. As such we now think he was entitled to recover. The petition to rehear is allowed, and the judgment below affirmed.

Petition Allowed.

Clark, C. J., dissenting. This is a petition to rehear this cause and reverse our opinion filed therein, 132 N. C., 510, 95 Am. St. Rep., 641. That opinion is itself a precedent and to be set aside, like any other precedent, only upon good cause shown. We have had the benefit of full and able argument upon both hearings, and diligent re-examination of the argument and the authorities shows that our former decision is in accord withour own precedents and those to be found elsefhere.

The complaint alleges that on April 6, 1900, "the plaintiff being a passenger on said defendant road" was injured by the derailment of the car in which he was riding, caused by the negligent construction of the road-bed and the negligent failure of the defendant to provide sufficient crew for said train, and its negligent failure to use such air-brakes and other machinery as were necessary to the safe and proper operation of said road. There is no allegation of willful and wanton injury nor proof of such. The complaint alleges that "the plaintiff was a passenger on said railroad for compensation, * * * the defendant having contracted and agreed to carry the plaintiff between said stations for a valuable consideration," and for a negligent breach of such contract of safe carriage this action is brought.

The plaintiff testified that he was editor of a newspaper; that when called on by the conductor for his fare he told him he had a pass for 1899 and showed it to him; that in 1899 he had made a contract with the defendant to publish its time-table in his paper as consideration for the pass, and the defendant had agreed to continue the contract and renew the contract; that he told the conductor he would pay the regular fare if he wanted it, but the conductor accepted his statement and took him as a passenger without payment of fare or ticket, on the strength of the alleged renewal by the company of the contract of 1899. Such contract was illegal

and is forbidden under the authority of the law-making power in this State under a penalty of "not less than one thousand dollars nor more than five thousand dollars" against the company, and this not being a valid but an illegal transaction the plaintiff cannot be accessory to and participate in such act and then ask a court of justice to give him damages for the defendant's negligence in executing such illicit arrangement.

The General Assembly has declared that public policy forbids discrimination in the exercise of their quasi-public duties by common carriers, and as was said by us in this case, 132 N. C., at page 512, "nothing could be more clearly a discrimination than the ground upon which the plaintiff asked for and received free passage on this occasion, to-wit, that for the year previous he had advertised the schedule of the defendant company in his paper and had received therefor a free pass over its line for the previous year and that this contract had been renewed for the year current. It does not appear what was the value of the advertising done, charging for the space at the same rates as would be charged others; but let it be what it may, it could not amount exactly 'neither more nor less' to the value of a free pass to travel *ad libitum* an unstipulated number of miles over the defendant's road. Besides, it was an illegal discrimination to sell the plaintiff transportation on credit and not payable in money." We need not repeat the discussion and construction of this statute as laid down in the able and exhaustive opinion of *Mr. Justice Montgomery* in *State v. Railroad*, 122 N. C., 1052, 41 L. R. A., 246, and in the very able opinion of *Mr. Justice Douglas* in that case, in which he referred to evidence of $250,000 of free transportation being given away annually in this State, the cost of which was necessarily considered in fixing the rate charged the unprivileged many. That opinion and subsequent ones have been long

published, and the Legislature has not seen fit to change the statute by making editors "a privileged class" who can ride free or on credit, with rates unknown, and thus have the cost of their transportation added to the price of transportation charged the public at large. One ground for this legislation is that discrimination in rates gives these corporations improper weight and influence, and this applies with as much force at least to discriminations and favors to editors as to others. The Court in *Greenleaf v. Bank,* 133 N. C., 292, held that lawyers and judges were not a privileged class, and we cannot hold that editors are, unless the General Assembly shall give them special privileges as to free or reduced transportation which is forbidden to the public generally.

Either (1) the plaintiff, having produced no ticket nor paying cash for his transportation, was on the train without authority of any contract, in which case, by all the authorities, he was entitled to what is known as "ordinary care," and hence can recover no damages unless there was willful and wanton injury, which in this case is neither alleged nor shown (*Pierce v. Railroad,* 124 N. C., 83, 44 L. R. A., 316; *Cook v. Railroad,* 128 N. C., 333; *Lewis v. Railroad,* 132 N. C., 382; *Higley v. Gilmer* (Mont.), 35 Am. Rep., 450; *Hendryx v. Railroad,* 45 Kan., at page 379, and cases there cited; *Railroad v. Burnseed* (Miss.), 35 Am. St. Rep., 656; *Railroad v. Mehlsack* (Ill.), 19 Am. St. Rep., 17; *Reary v. Railroad* (La.), 8 Am. St. Rep., 497; *Railroad v. Mecham,* 91 Tenn., 428; *Whitehead v. Railroad,* 99 Mo., 263, 6 L. R. A., 409), for neither the conductor nor the company could give legal assent to his riding contrary to law without payment of fare and his condition was that of a trespasser, not being a passenger.

Or (2) the plaintiff, as he alleges in his complaint, sues for injuries sustained by breach of the contract of safe car-

riage caused by negligence of the defendant, and one of his prayers for instruction is based upon the theory that the plaintiff was a passenger for hire and compensation. In such case the rule is thus stated, 1 Sutherland Damages, section 5 (3 Ed.): "It may be assumed as an undisputed principle that no action will lie to recover a demand *or a supposed claim for damages* if to establish it the plaintiff requires aid from an illegal transaction, or is under the necessity of showing and depending in any degree upon an illegal agreement to which he was a party"—citing numerous cases. *Judge Sutherland* further says that "a bank is not liable for failure to perform its contract to lend or advance money to be used in speculating in futures (*Moss v. Bank,* 102 Ga., 808). The sender of a telegram relating to a gambling contract in stocks cannot invoke such contract or the loss or gain resulting from it to measure the damages sustained in consequence of its non-delivery (*Morris v. Telegraph Co.,* 94 Me., 423)." In *Griswold v. Waddington,* 16 Johns, 439, *Chancellor Walworth* says, at page 486: "The plaintiff must recover upon his own merit, and if he has none, or if he discloses the case founded upon illegal dealing and founded on an intercourse prohibited by law he ought not to be heard, whatever the demerits of the defendant may be. There is to my mind something monstrous in the proposition that a court of law ought to carry into effect a contract founded on a breach of law. It is encouraging disobedience and giving to disloyalty its unhallowed fruits. There is no such mischievous doctrine to be deduced from the books." In *Bowman v. Phillips* (Kansas), 13 Am. St. Rep., 202, 3 L. R. A., 631, it is held: "The courts will not enforce illegal contracts nor any supposed rights founded thereon, but will leave the parties and those *in pari delicto* where they find them." In *Oscanyan v. Arms Company,* 103 U. S., 261, an action for damages for breach of contract, the Court held that when such con-

tract is void, because against public policy or in violation of law, the Court will nonsuit the plaintiff. In *Phalen v. Clark* (Conn.), 10 Am. Rep., 253, the Court held: "Where the plaintiff requires any aid from an illegal transaction to establish his demand he must fail."

In *Welch v. Aesson,* 6 Gray, 505, it is said: "It may be assumed as an undisputed doctrine that no action will lie to recover a claim for damages if, to establish it, the plaintiff requires aid from an illegal transaction or is under the necessity of showing or in any manner depending upon the illegal act to which he is a party." In *Pullman v. Transportation Co.,* 171 U. S., at page 150, *Mr. Justice Beckham* quotes with approval from *Lord Mansfield* in *Holman v. Johnson,* 1 Cowper, 341, decided in 1775: "The objection that a contract is immoral or illegal * * * sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of public policy. * * * The principle of public policy is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." It can make no difference whether the action is to recover upon such contract to enforce specific performance or (as here) to recover damages for breach thereof. The precise point here presented has been three times passed upon in this Court, not only in the case here sought to be reversed, 132 N. C., 510, but in two other cases. In *Smith v. Turner,* 63 N. C., 522, it was held that where a soldier *contracted* with a railroad for transportation to Johnston's army and was injured *en route* by negligence of the company he could not recover damages (though there the contract was legal when made), *Reade, J.,* saying that the contract being illegal (in the purview of the Court trying the action) the parties were *in pari delicto,*" and the Court "would consult its dignity and not

interfere in their dispute." Exactly the same decision was made in *Wallace v. Cannon*, 38 Ga., 199, 95 Am. Dec., 385; *Martin v. Wallace*, 40 Ga., 52; *Redd v. Railroad*, 48 Ga., 102; *Railroad v. Redd*, 54 Ga., 33; in all which the Court held, as in 40 Ga., 55: "While so engaged the parties were *in pari delicto* and the courts * * * cannot lend their aid to assist either in the case of injury sustained by the negligence or misconduct of the other." Another case in this State is *Waters v. Railroad*, 110 N. C., 338, 16 L. R. A., 834, where the Court held (at page 342) that where the illegal purpose of the shipper or passenger enters into the consideration of the contract of transportation the railroad is exempt from liability for negligence, meaning evidently that the Court will not take jurisdiction of such controversies. Here both parties participated in the illegal purpose of transporting the plaintiff, contrary to law, without payment of fare, and as in the above cases "while so engaged the parties were *in pari delicto* and the courts cannot lend their aid to assist either in the case of injury sustained by the negligence or misconduct of the other."

It is immaterial whether the plaintiff had in his pocket a free pass from the president of the railroad company or was allowed by the conductor to ride illegally, without payment of fare, in consideration of the plaintiff's statement that the company had promised to renew the pass. The conductor, no more than the president, could give the plaintiff the legal right to ride free, unless the plaintiff came within one of the excepted classes entitled to that privilege, as railroad employees and officials, charity cases and the like. It was an illegal contract equally whether made by the conductor or the president. Whether the conductor had the legal right to bind the company by his action so as to subject it to the penalty denounced by the statute is not before us. But if he had not, then the plaintiff had no claim to a contract of passage

on that ground, and comes under the first head above, not being a passenger, and could only recover for willful and wanton injury

The point here presented is well settled in the text-books and by decisions in other States, that the plaintiff cannot recover when he is negligently injured while on the train without any valid contract of carriage, *i. e.,* when he is a licensee or trespasser. In such cases he can only recover if wantonly and willfully injured, or, as it is sometimes styled, for gross negligence, which is the synonym for "willful and wanton injury" in those cases. Black Law Dict., "Passenger," says that a passenger is "One who has taken his place in a public conveyance *by virtue of a contract* for the purpose of being transported from one place to another on the payment of fare or its equivalent, *Bricker v. Railroad,* 132 Pa., 1, 19 Am. St. Rep., 585; and a carrier is not liable to one who rides by stealth, *Railroad v. Michie,* 83 Ill., 427; or who is a trespasser, *Mealhauser v. Railroad,* 91 Mo., 322; although invited to ride by an employee of the carrier, *Railroad v. Campbell,* 76 Texas, 174; nor a voluntary assistant to an express messenger or mail clerk, *Railroad v. Nichols* (Kan), 12 Am. Rep., 475; or a newsboy permitted to ride free, *Flower v. Railroad,* 69 Pa., 210, 8 Am. Rep., 257; *Snyder v. Railroad,* 60 Mo., 413." Certainly the plaintiff, who was on this train by an arrangement denounced by the statute under a penalty of "not less than $1,000 nor more than $5,000 fine," is not in so good a situation as those above named as barred of recovery.

Hutchison on Carriers, section 555, says: "To be entitled to the right of a passenger, the plaintiff who sues for an injury occasioned by the negligence of the company must have been lawfully upon its train," and that if sued for the injury it can defend upon the ground that the plaintiff had induced the servants of the company to carry him upon a ticket on

which he had no right to ride. 2 Minor's Wood Railways (2 Ed.), 1213, instances among persons not entitled to recover for negligent injuries one 'who, contrary to the rules, gets on a freight train, even with the assent of the conductor, and pays no fare, or a trespasser upon a regular passenger train." If the assent of the conductor does not make him a passenger when riding contrary to the rules of the company, such assent cannot set aside a statute forbidding the plaintiff to ride without paying fare. 3 Elliott Railroads, section 1255, says: "A railroad company owes trespassers no contract duty. Indeed, it owes them no duty except not to willfully injure them." 1 Fetter Passengers, section 240, uses almost the same language: "The only duty due by a railroad company to one who is an intruder or trespasser on its trains is to refrain from wantonly, willfully or intentionally injuring him. It is not liable for an injury caused by the mistake, inadvertence or negligence of its employees." 2 Shear. & Red. Neg., section 489, holds that "one who by collusion with a servant of the carrier rides without intending to pay fare * * * does not bring him into contract relation with the company so as to make it liable to him as a passenger." To the same purport, Thomp. Carriers, 43. Booth Street Railways, section 326, says: "The duty of a common carrier does not extend to the personal safety of one who is not actually a passenger," and the same work at section 365: "Newsboys who enter street cars for the purpose of selling papers are not passengers, but mere licensees who assume all the risks of ordinary negligence on the part of the company's servants." Certainly the newsboys who are legally on the car, with the assent of the company, cannot have greater rights than this plaintiff, who was riding without payment of fare in violation of law. Bishop Non-Contract Law, section 60, says: "If the negligent running of a railroad train injures one who is on it without right he can recover nothing." 2

Jaggard Torts, 1081, says: "When no consideration is paid, though the plaintiff was aboard the train by the invitation or request of defendant's employees, he cannot recover for negligence," citing numerous cases.

All the above are based upon the idea that no one can recover for negligent injuries unless a passenger, and that no one is a passenger unless there is a legal contract, express or implied, a legal obligation to convey him. The above citations from text-books are amply sustained by authorities, among which: "A railroad company owes no duty to a trespasser on its trains except to abstain from wantonly or maliciously injuring him." *Railroad v. Harris,* 71 Miss., 74. "One who is allowed by the conductor to ride as an assistant express messenger without paying fare, under a misapprehension of the conductor that he need not pay, cannot recover damages for injuries sustained by negligence of the carrier." *Railroad v. Nichols,* 8 Kansas, 505. In the very interesting opinion by *Judge Valentine,* he says: "The conductor did not attempt to confer upon the plaintiff any right to ride upon that train, but simply left the plaintiff with the right which he supposed the plaintiff already had, independent of any authority from himself"—the same facts as in this case, though under our statute the conductor could confer no right to ride free when the company itself was prohibited by statute from doing so. In *Railroad v. Meachem,* 91 Tenn., 428, it is held that the company is not liable for injuries sustained by a trespasser or intruder upon its trains "except to refrain from wilfully, wantonly or intentionally injuring him," and defines a trespasser as one who rides without payment of fare or authorized invitation. In *Railroad v. Beggs,* 85 Ill., 84, 28 Am. Rep., 613, the same ruling as to nonliability was made as to one riding illegally upon a free pass which had been issued to another person, and this has been cited and affirmed in *Railroad v. Mehlsack,* 131 Ill., 61.

The pass there used was not more illegal than the pass which the plaintiff in this case presented. *Eaton v. Railroad*, 57 N. Y., 382, 15 Am. Rep., 513, held that one not lawfully upon the train, as one riding upon a freight train, could not recover for negligent injuries though upon the train by the invitation of the conductor. In *Railroad v. Campbell*, 76 Texas, 174, it was held that one injured negligently while riding on a freight train could not recover because unlawfuly there; and the same ruling was made, and on the same ground, as to one injured while riding upon the engine by permission of the engineer. *Railroad v. Michie*, 83 Ill., 427. The plaintiff in the present case was not lawfully upon the train, it being forbidden by law to carry him without prepayment of fare, and neither the conductor nor the company had authority to receive him on the train without it. In *Condran v. Railroad*, 67 Fed. Rep., 522, 28 L. R. A., 749, it is held that one who wrongfully evades payment of fare cannot recover for injuries unless wantonly and willfully inflicted.

In *Railroad v. Berry*, 53 Kan., 112 (42 Am. St. Rep., 278), it is held that one riding upon a railroad train merely by permission of the conductor and without payment of fare cannot recover for personal injuries like a passenger; affirming *Railroad v. Wheeler*, 35 Kan., 185. In *McVeety v. Railroad* (Minn.), 11 L. R. A., 174, 22 Am. St. Rep., 728, it is held that one "who knowingly induces the conductor of a railway company to carry him without charge" cannot recover as a passenger. In *Williams v. Railroad*, 19 So. Rep., 90 (Miss., 1895), it was held that one illegally riding free by consent of the conductor could not recover, and the same was held in *Railroad v. McAfee*, 71 Miss., 70 (1893), as to one riding free by collusion with the railroad crew and was beaten by them; the latter case is put on the ground of

in pari delicto that he had "participated in the violation of duty."

One riding on a train illegally, for instance, contrary to a rule of the company known to him though with permission of the conductor, cannot recover for injuries sustained by negligence. *Purple v. Railroad,* 114 Fed. Rep., 123, 57 L. R. A., 700; *Railroad v. Campbell,* 76 Texas, 174; *Greenfield v. Railroad* (Mich.), 95 N. W., 546 (March, 1903). "The only duty a common carrier owes to one not a passenger is not to injure him wantonly." *Hendryx v. Railroad,* 25 Pac., 893. "One riding on a railway train free of charge by invitation and permission of the conductor is not a passenger so as to entitle him to recover for injuries received." *Stalleup v. Railroad,* 16 Ind. App., 584 (1897); and there are numerous other decisions to the same effect.

The bed-rock principle deduced from all the decisions and text writers is that an action for injuries for negligence of a common carrier is an action of tort arising on contract and can never be sustained except when there is a breach of a legal and valid contract of safe carriage, that as to torts not arising out of contract recovery can only be had when the injury was inflicted wantonly and willfully.

This is sound in principle and well settled, if any principle can be settled by precedent.

Taking it in the most favorable light for the plaintiff, he was riding on an extension of an illegal pass. That being so, upon the authorities in our State and those from other States and text writers above cited, the plaintiff cannot recover damages sustained by the negligent breach of such illegal contract of carriage. There are other authorities to the same purport. In Massachusetts, where traveling on the Lord's Day except from necessity, or for purposes of charity, was made illegal, it was held in an opinion by that eminent lawyer, *Shaw, C. J.*, in *Bosworth v. Swansey,* 10

Metc., 363, 43 Am. Dec., 441, that one so traveling illegally could not recover damages caused by a defect in the highway, and to the same purport is *Conolly v. Boston,* 117 Mass., 64, 19 Am. Rep., 316, and *Davis v. Somerville,* 128 Mass., 594, 35 Am. Rep., 399 (1880). The same was held as to recovery of damages sustained by negligence of a street car company by one traveling thereon on Sunday (*Stanton v. Railroad,* 14 Allen, 485); and as to one negligently injured at a railroad crossing while illegally traveling along the public road on Sunday. *Smith v. Railroad,* 120 Mass., 492, 21 Am. Rep., 538. In *Gregg v. Wyman,* 58 Mass., 322, it was held that the owner of a horse who let him for driving on Sunday, against the statute, could not recover damages for the death of the horse by immoderate driving, because the parties were *in pari delicto,* the Court saying its conclusion "is fully sustained by numerous decisions both in England and the various States of the Union," many of which it cites, and the same is held in *Way v. Foster,* 83 Mass., 408, and *Parker v. Latner,* 60 Me., 529, 11 Am. Rep., 210. In *Lyons v. Desotelle,* 124 Mass., 387, it was held that one traveling on the Lord's Day in violation of the statute, and who had fastened his horse at the side of the road, could not invoke the aid of the courts to recover damages for injuries to his horse caused by the negligent act of another in driving against it. In *McGrath v. Merwin,* 112 Mass., 467, 17 Am. Rep., 119, it was held that one injured by the negligence of the defendant while clearing out a wheel-pit, though gratuitously and as an act of kindness, on the Lord's Day, could not recover damages, because participating at the time the injury was sustained in an act in violation of law. In *Wallace v. Navigation Co.,* 134 Mass., 95, 45 Am. Rep., 301, it was held that one sailing his yacht on Sunday in violation of the statute could not recover damages for being negligently run into by a steamboat, because he was there in vio-

lation of law, as the plaintiff was in this case. These decisions were uniform in that State till changed by statute as to injuries from common carriers (Laws 1877, chapter 232), which provides that the general statute, chapter 84, section 2, "prohibiting travel on the Lord's Day shall not constitute a defense to an action against a common carrier of passengers for any tort suffered by a person so traveling." There is no statute in North Carolina taking away from common carriers the defense of *in pari delicto* in case of one traveling on a free pass. The defendant relied on *Carroll v. Railroad,* 58 N. Y., 126, 17 Am. Rep., 221, where it was held that the plaintiff, injured on a ferry boat while traveling on Sunday contrary to the statute, could recover, but the Court put its decision on the ground (page 132) that if the plaintiff was going in a case of necessity or charity he was not traveling illegally, and as the defendant had the right to carry him and to enforce payment of the fare, if the illegal purpose of the plaintiff was unknown to the defendant, the latter made a valid contract of carriage and was liable for negligence in executing it. Here the plaintiff solicited the illegal carriage by saying his pass had been renewed, and the conductor acted upon it. Both parties knew of the illegality.

In *Smith v. Rollins,* 11 R. I., 464, 23 Am. Rep., 509, where a livery-stable keeper let his horse for driving on Sunday contrary to the statute, and the other party drove to a different place and brought the horse back damaged, it was held that the plaintiff could not recover, the Court saying (page 472): "If the tort cannot be made to appear without proof of the contract, certainly the contract can hardly be considered immaterial, or as not affecting the liability of the defendant, even though it may not be a part of the cause of action." In *Holcombe v. Damby,* 51 Vt., 428, the Court says (page 435), affirming previous cases: "It has been repeatedly held in this State that if a party sustain injury

by reason of the insufficiency in the highway while such party is traveling in violation of the statute, he cannot recover of the town for such injury." In *Lord v. Chadbourne*, 42 Me., 429, 66 Am. Dec., 290, it was held that the plaintiff could not recover damages for the alleged seizure of his whiskey if he was keeping it for sale in violation of law.

Among many cases holding that a party participating in an illegal act cannot obtain from the Court relief for an illegal act or neglect of the other party, if such conduct of the defendant cannot be shown without showing the precedent conduct of the plaintiff, in violation of law, are *Light Co. v. Veal*, 145 Ind., 506, which held that a county treasurer loaning out county funds contrary to law cannot maintain an action to recover them back. *Haggerty v. Ice Co.*, 143 Mo., 238, 65 Am. St. Rep., 647, 40 L. R. A., 157, holds that where it is contrary to law to have game in possession during the "close season," one who has deposited game in violation of the statute with a cold storage company "cannot recover damages for violation of the contract or for negligence in its performance," the Court saying the complaint shows "that the plaintiff contracted with the defendant corporation for the commission of a misdemeanor. * * * The law will not stultify itself by promoting on the one hand what it prohibits on the other, and will for this reason leave the parties to the suit where it finds them, unsanctioned by its favor and unaided by its process." That case is identical in principle with this, the plaintiff having committed no misdemeanor but having procured the defendant to contract to do an indictable act, as in this case.

Upon similar grounds, in *Ketchum v. Greenbaum*, 61 Mo., 110, it was held that the plaintiff could not recover a prize drawn on a lottery ticket, upholding the maxim *in pari delicto potior est conditio defendentis et possidentis*—not that the defendant has right on his side but because the Court

will help neither party to an illegal transaction. In *Youngblood v. Trust Co.,* 95 Ala., 521, 36 Am. St. Rep., 245, 20 L. R. A., 58, it was held: "No rights can spring from or be rested upon an act in the performance of which a criminal penalty is incurred, and all contracts which are made in violation of a penal statute are absolutely void." In *Brewing Co. v. Wall,* 98 Mich., 158, it was held that a liquor dealer doing business in violation of the statute could not recover damages for violation of a contract by a company to make him its exclusive agent in that locality. The plea that he could legally buy, though he could not legally sell, was overruled on the ground that he was buying to illegally sell. In *Kelly v. Courter,* 1 Okla., 277, it was held that a tenant selling liquor in violation of law could not recover damages to such liquor caused by the failure of the landlord to supply ice as agreed, the Court resting its decision upon a citation from *Ewell v. Daggs,* 108 U. S., 146, that the law will not lend its aid where the contract "appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land, Broom's Leg. Max., 108"—which was the case in this transaction now before the Court. The Oklahoma Court neatly sums up thus: *"The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."* Many cases to like purport could be added, but it is useless to multiply authorities upon a principle so well settled in the law and in reason.

The same general principle that no action can be sustained if based in anywise upon an illegal contract which must be put in evidence—*ex turpi causa actio non oritur*—is supported by all the precedents in this Court in which a contract was necessarily alleged as in this case. *Basket v. Moss,* 115 N. C., 448, 44 Am. St. Rep., 463; 45 L. R. A., 842; *Burbage v. Windley,* 108 N. C., 357, 12 L. R. A., 409;

Pucket v. Alexander, 102 N. C., 95, 3 L. R. A., 43; *Griffin v. Hasty,* 94 N. C., 438; *Covington v. Threadgill,* 88 N. C., 186; *King v. Winants,* 71 N. C., 469, 17 Am. Rep., 11; *Whitaker v. Bond,* 63 N. C., 290; *Carter v. Greenwood,* 58 N. C., 410; *McRae, v. Railroad,* 58 N. C., 395; *Ingram v. Ingram,* 49 N. C., 188; *Ramsay v. Woodard,* 48 N. C., 508; *Allison v. Norwood,* 44 N. C., 414; *Sharp v. Farmer,* 20 N. C., 122, and "there are others." The plaintiff cannot recover for negligence without showing he was on the train under a valid contract of carriage, and the contract he shows is one against public policy and makes at least one of the parties indictable. Whether the other party is not also indictable as an accessory in procuring such violation of law is an interesting question, but not now before us.

The plaintiff's allegation is that he was on the train by virtue of his contract for a free pass. Such transaction being a discrimination, as above shown, the penalty denounced by the statute upon the common carrier for such violation of law is a fine "not less than one thousand dollars nor more than five thousand dollars," and the penalty of the law upon the other party is that, if negligently injured during such illegal transportation, he cannot recover in the courts, since he must put forward such illegal transaction as the basis of his action. If his own act was not indictable, he procured an act by the defendant which was a misdemeanor and obtained transportation thereby.

A court of equity will not interfere with a contract, if it be illegal and against State policy, where the contractors are *in pari delicto. Taylor v. McMillan,* 123 N. C., 393, citing *Grimes v. Hoyt,* 55 N. C., 271. If there was no contract of carriage the plaintiff had no rights as a passenger, but only the right to be protected against willful and wanton injury, which is not alleged here. If he had any contract, it was

one void under our decisions, being forbidden by statute and against public policy, and he is in no better condition.

The decisions in some courts as to persons injured while riding upon *legal* free passes are not authority in favor of plaintiff, who asked and accepted free transportation *illegally*. The conductor had no right to receive him as a passenger, and plaintiff was fixed with knowledge of the law, and is in no condition to ask the Court for damages not inflicted willfully and wantonly.

The former judgment of this Court ordering a new trial should be affirmed and the petition to rehear dismissed upon at least two other grounds not heretofore discussed, because not deemed necessary.

Jones, a witness for the defendant, testified that he sent the plaintiff the pass as a gratuity, upon his application; that he paid nothing for it; that there was no contract to publish the time-table, and that he made no agreement to renew the pass when it expired. The defendant asked the Court to charge "that there is no evidence to support the plaintiff's allegation (in the complaint) that he was traveling on the defendant's road, on the occasion complained of, as a passenger for hire or compensation." It was error to refuse this, for whether the plaintiff's or the defendant's testimony was correct, whether the pass had been renewed or not, the plaintiff was not a "passenger for hire or compensation." *State v. Railroad Co.*, 122 N. C., 1052, 41 L. R. A., 246.

The defendant also excepted properly to this charge of the Court: "If when the plaintiff was called on for his fare he produced to the conductor the pass which has been exhibited in evidence and the conductor accepted it, the plaintiff was a passenger on the train." The pass on its face had expired and there was no testimony that it had been renewed. The Judge does not add the proviso "if it had been renewed," and if it had not been, certainly it could not make him a

passenger. On the contrary, if the plaintiff's own evidence was true that a pass was issued in consideration of publishing the time-table, and further that the defendant had agreed to renew it, this being an agreement to make a contract forbidden by our statute against discrimination, the plaintiff was equally not a passenger. In any aspect this instruction was erroneous.

The point here presented has been admirably discussed by *Sanborn, U. S. Circuit Judge,* in the recent case, above cited, of *Purple v. Railroad,* 114 Fed., 123; 57 L. R. A., 700, which holds: "One who, knowing that a conductor has no authority to grant free transportation, rides upon a train under an arrangement, or tacit understanding, with the conductor that he shall ride free, is not a passenger, but a mere trespasser to whom the only duty of the company is to abstain from willful or reckless injury; that a contract of carriage is indispensable to a recovery and that the implied contract from plaintiff being on the train was conclusively negatived upon showing the illegal agreement to transport without payment of fare." To same purport *Condran v. Railroad,* 28 L. R. A., 749; *Railroad v. Mehlsack,* 131 Ill., 64; *Railroad v. Beggs,* 85 Ill., 84; *Railroad v. Michie,* 83 Ill., 431; *Railroad v. Brooks,* 81 Ill., 250; *McVeety v. Railroad,* 45 Minn., 269, 11 L. R. A., 174; *Robertson v. Railroad,* 22 Barb., 91; *Railroad v. Campbell,* 76 Tex., 175; *Prince v. Railroad,* 64 Tex., 146; *Way v. Railroad,* 64 Iowa, 48; S. C., 73 Iowa, 463; *Hendryx v. Railroad,* 45 Kans., 377; *Railroad v. Whipple,* 39 Kans., 531; *Railroad v. Gantz,* 38 Kans., 608; *Railroad v. Nichols,* 8 Kans., 505, 12 Am. Rep., 475.

Here the plaintiff was fixed with notice in law that neither the company nor the conductor could transport him without payment of fare. In *McGraw v. Railroad,* 135 N. C., 264, at this term, it was held that though one had a ticket he cannot recover for willful expulsion if the conductor erro-

neously but reasonably supposed he had no ticket. *A fortiori*, the plaintiff cannot recover when he had no ticket, which the conductor knew, and there was no force used, but merely negligence is averred. In *Duncan v. Railroad*, 113 Fed., 508 (1902), the Court says, on this very point, of the plaintiff being injured while riding on a pass illegally contrary to the interstate commerce prohibition (of which ours is a verbation copy), "Of course if the foundation of the right against a common carrier were contract, it would be apparent that, under familiar maxims of the law, no action would lie, because even though the plaintiff is not subject to any penalty imposed by the interstate commerce statute, he would be *in pari delicto*. Indeed, he would be the party especially enjoying the benefit of the combination in violation of law." Here the complaint bases the action, and necessarily so, upon breach of the contract of safe carriage.

MONTGOMERY, J. I concur in the dissenting opinion of the Chief Justice.

WALKER v. RAILROAD CO.

(Filed June 1, 1904).

1. NEGLIGENCE — *Proximate Cause—Railroads—Sufficiency of Evidence.*

In this action for injuries received from a sand-dryer there is evidence sufficient to go to the jury as to the negligence of the defendant, and that this negligence was the proximate cause of the injury.

2. CONTRIBUTORY NEGLIGENCE—*Evidence—Sufficiency of Evidence.*

In this action for injuries received from a sand-dryer the trial judge properly instructed the jury that there was no evidence of contributory negligence.

3. INSTRUCTIONS—*Issues—Contributory Negligence—Trial.*

While an instruction to the jury in a personal injury case to answer the issue of contributory negligence "no" is bad in form, yet it is not ground for reversal, where there is in fact an entire absence of evidence of contributory negligence.

4. ASSUMPTION OF RISK—*Railroads—Defenses—Acts (Private) 1897, ch. 56.*

Under the act depriving railroad companies of the defense of assumption of risk, a railroad company cannot plead such defense to an action by an employee for injuries from a defective sand-dryer.

ACTION by William Walker against the Carolina Central Railroad Company, heard by *Judge W. H. Neal* and a jury, at July Term, 1903, of the Superior Court of MECKLENBURG County.

This is an action on account of personal injuries received by the plaintiff through the negligence of the defendant. The evidence tends to prove that the plaintiff's clothing caught fire from a defective sand-dryer which he was operating in

the performance of his ordinary duties. The issues and answers thereto were as follows:

"Was the plaintiff injured by the negligence of the defendant as alleged in the complaint?" Answer: "Yes."

"Did the defendant, by his own negligence, contribute to his own injury?" Answer: —

"What damage has the plaintiff sustained?" Answer: "$900."

The only assignments of errors are as follows: The defendant requested the Court to charge as follows: "There is no evidence of negligence of the defendant corporation, and the jury will answer the first issue 'No.'"

His Honor refused to give this instruction, to which refusal the defendant excepted.

The defendant further requested the Court to charge as follows: "There is no evidence that the hurt done to the plaintiff was caused by the negligence of the defendant, and the jury is therefore instructed to answer the first issue 'No.'"

His Honor refused to give this instruction, and to this refusal the defendant excepted.

Upon the second issue his Honor charged the jury as follows: "There is a second issue, Did the plaintiff, by his own negligence, contribute to his own injury? And the Court charges you, upon the testimony, to answer that issue No."

The plaintiff testified that he had been working for the defendant in the same capacity for three years, and had worked with the machine in bad shape for thirty days; that he had called the attention of the master machinist—the "boss man"—to the defects in the dryer and he had patched it up. Being asked to describe the machine, he did so as follows: "There was a kind of bowl, or hopper, with legs to it; kinder like a stove; hopper was in the shape of a sugar-loaf hat and stood on a foundation; underneath was holes the size of a silver dollar; sand ran out of hopper through these

holes; in the foundation was a door; the foundation was brick-work; there was a furnace underneath and above the foundation; this was made of cast-iron; hopper was made of wire and was funnel-shaped; don't know what kind of wire; good-sized wire. You put the fire in a door when the machine was in good order; put the sand—wet sand—in there to be dried. When it was dry the sand came out from the edges of the door all around where the holes were; had to get down and shovel it out where I could sift it; took it out with a large scoop. Machine had a pipe on it when it was in good shape a good while ago; pipe extended out through the top of the house. The sand-dryer was in a house; pretty good house; one room and had a partition—a kind of sand bin. He had took and patched it. The top rim of the bowl had fallen down on the bottom. They had took some of this old sewer-pipe and patched it where it had fell in, and dobbed it up with mud and left the stack off of it. There was an old piece of stack in the yard that I had used, but I couldn't manage with that. * * * When I caught on fire I was shoveling sand from underneath, where the sand run out. The hopper had squshed down. I couldn't put but a little bit of sand in at the time; couldn't cover up the holes because it was shallow." (Shows jury where he was standing to take sand out). "I suppose the blaze of one of the holes caught me on fire. I don't know exactly. I was on fire and had to do around."

From a judgment for the plaintiff the defendant appealed.

Clarkson & Duls and *T. L. Kirkpatrick*, for the plaintiff.
Burwell & Cansler and *Day & Bell*, for the defendant.

DOUGLAS, J., after stating the facts. While we are not mechanical experts, we think that the fact that a cast-iron sand-dryer had the smoke-pipe knocked off, was "squshed

down" and was daubed up with mud, was some evidence of a defective machine from which the jury might have inferred the negligence of the defendant. That the plaintiff's clothing caught on fire when the only fire anywhere near him was in the sand-dryer, would tend to show that he caught on fire from the sand-dryer. The further fact that he had been working with sand-dryers for three years and never caught fire until this machine became defective, would, with his other testimony, also tend to prove that the defect was the cause of his being burned. Therefore, the prayers to instruct the jury that there was no evidence tending to prove the negligence of the defendant, or that such negligence was the approximate cause of the injury, were properly denied. The duty of the defendant to furnish safe machinery, the failure of which constitutes continuing negligence, is too well settled to require any great degree of argument or authority. *Greenlee v. Railroad,* 122 N. C., 977, 41 L. R. A., 399, 65 Am. St. Rep., 734; *Troxler v. Railroad,* 122 N. C., 903; S. C., 124 N. C., 189, 44 L. R. A., 313, 70 Am. St. Rep., 580; *McLamb v. Railroad,* 122 N. C., 862; *Coley v. Railroad,* 129 N. C., 407, 57 L. R. A., 817.

Upon the issue of contributory negligence the Court charged as follows: "The Court charges you, upon the testimony, to answer that issue No."

We cannot approve of the form of such an instruction, and yet as it was correct in legal effect under the testimony in this case we cannot set aside the verdict. What his Honor evidently meant was that there was no evidence tending to prove contributory negligence, and in that we think he was correct. As his charge was in legal effect merely the direction of a negative verdict upon the entire absence of evidence, it comes within the rule laid down in *Wittkowsky v. Wasson,* 71 N. C., 451, and *Spruill v. Ins. Co.,* 120 N. C., 141, cited with approval in *Lewis v. Steamship Co.,* 132 N. C., at page

910. It has been suggested that the question of assumption of risk arose under the issue of contributory negligence and should have been submitted to the jury. This is answered by reference to the act of February 23, 1897 (Private Laws, chapter 56), depriving railroad companies of such a defense. *Thomas v. Railroad,* 129 N. C., 392; *Cogdell v. Railroad,* 129 N. C., 398. The judgment of the Court below is affirmed.

Affirmed.

LUMBER CO. v. LUMBER CO.

(Filed June 2, 1904).

1. DUE PROCESS OF LAW—*Constitutional Law—Forfeitures—Vested Interests—The Code, sec. 2522—Acts 1889, ch. 243—Const. N. C., Art. I, sec. 17.*

An act providing that the owner of swamp lands failing to pay certain taxes shall forfeit the land to the state board of education is not constitutional.

2. TRESPASS—*Judgments.*

Where, in an action for trespass on lands, the jury found that plaintiff owned a portion of the lands described in the complaint, but that the defendant had not trespassed on that portion, it was error to include in the judgment a decision that the title to such portion was in plaintiff.

ACTION by the J. L. Roper Lumber Company against the Elizabeth City Lumber Company, heard by *Judge M. H. Justice* and a jury, at March Term, 1903, of the Superior Court of CAMDEN County. From a judgment for the plaintiff the defendant appealed.

Rodman & Rodman and *W. M. Bond* for the plaintiff.

E. F. Aydlett and *W. W. Clark,* for the defendant.

DOUGLAS, J. The main question on this appeal, to which nearly all the exceptions are directed, is the constitutionality of chapter 243 of the Acts of 1889 amending section 2522 of The Code. This act was held to be unconstitutional in *Parish v. Cedar Co.*, 133 N. C., 478; and after renewed consideration we deem it our duty to reaffirm our decision to that effect. This destroys the defendant's chain of title, but does not necessarily perfect that of the plaintiff or render the defendant liable for trespass. The plaintiff brought a civil action in the nature of trespass, alleging its ownership of the land in question and the defendant's trespass thereon. The jury found in substance that the plaintiff owned a part of the lands described in the complaint, but that the defendant had not trespassed upon those particular lands. This was the practical result of the verdict, and its legal effect was to entitle the defendant to a judgment that it go without day and recover its costs incurred in the action. We do not think that any judgment should have been given deciding the title to the land, as that was not the essential question involved in the action. Trespass is essentially an offense against the possession, and an action therefor can be maintained by one not holding the fee. On the contrary, it makes no difference who owns the fee if the defendant has committed no trespass thereon. If both issues had been found in favor of the plaintiff, it may be that he would have been entitled to a judgment on his title as a necessary requisite to his recovery; but as he is not entitled to a recovery a simple judgment for the defendant should have been entered. The judgment of the Court below will be modified by striking out that part decreeing the plaintiff to be the owner of the lands therein described, and then affirmed.

Modified and affirmed.

LUMBER CO. v. LUMBER CO.

(Filed June 2, 1904).

TRESPASS—*Issues—Damages—Contracts.*

In an action for trespass on lands counsel agreed that if the jury should answer the first issue as to title "yes" then it was admitted that defendant had trespassed and that the amount of damages should be ascertained under The Code. The first issue was whether plaintiff was the owner of the lands described in the complaint or any part thereof. The second was, "If so, what part?" It was not error to submit a third issue as to whether defendant had trespassed on lands described in the complaint, and which were inside a certain grant to plaintiff, where it appeared to the court that the evidence raised a question as to whether defendant might not have trespassed on lands described in the complaint, but which it might be found were not within the grant and did not belong to plaintiff.

ACTION by the J. L. Roper Lumber Company against the Elizabeth City Lumber Company, heard by *Judge M. H. Justice* and a jury, at March Term, 1903, of the Superior Court of CAMDEN County. From a judgment for the defendant the plaintiff appealed.

Rodman & Rodman and *W. M. Bond*, for the plaintiff.
E. F. Aydlett and *W. W. Clark*, for the defendant.

DOUGLAS, J. The exceptions on this appeal all refer to an agreement by counsel, which is in the following words:

"In this cause it is agreed that if the jury should answer the first issue as to title 'Yes,' then it is admitted that defendant has trespassed and the amount of damages is reserved to be ascertained by a reference under The Code."

The issues were submitted and answered as follows:

1. "Is the plaintiff the owner of the lands described in the complaint, or any part thereof?" Ans. "Yes."

2. "If so, what part?" Ans. "All the lands conveyed to Weeks and Valentine by accurate measurement, except the M. D. Gregory and Joseph Burgess grants."

3. "Has the defendant cut timber or committed other acts of trespass on the lands described in the complaint, and inside the Weeks and Valentine grants?" Ans. "No."

Upon the coming in of the verdict the plaintiff moved to set aside the finding upon the third issue, and moved that the cause be referred under the aforesaid agreement, to ascertain the damage, and moved the Court to sign the judgment tendered.

It further appears from the record that after all the evidence was in and after all the speeches had been made except the last speech on each side, the Court decided to submit the third issue, and to submit to the jury under the first issue only the question of title as conveyed by the deeds, and under the third issue the location of the grant under which the plaintiff claimed. That the speeches prior to this argued the location under the first issue. To the submission of the issue and the question of location of the Weeks and Valentine grants under that issue plaintiff excepted. The plaintiff insisted that the submission of the third issue under the agreement of counsel heretofore set out and referred to in section three hereof, was an error, and that the Court should instruct the jury under that admission to answer the third issue "Yes."

Upon the return of the verdict, the plaintiff moved to strike out the third issue and the finding thereon by the jury, upon the ground that the same had been submitted contrary to the agreement of the counsel on record in the cause.

We see no error in the action of his Honor. We think he had the power to submit such issues as were necessary to properly present the facts of the case. *Tucker v. Satter-*

thwaite, 120 N. C., 118. The finding of the jury upon the issues submitted was in effect that the plaintiff owned a *part* of the lands mentioned in the complaint, but that the defendant had not trespassed on those particular lands. This finding necessarily set aside the agreement as inapplicable. If the defendant had not trespassed upon the plaintiff's lands, it made no difference in this suit if it had trespassed upon lands belonging to some one else. Nor was the plaintiff hurt in any way by the division of the first issue even under the agreement. The agreement was to be operative only in the event that the jury answered "Yes" to the first issue as then constituted. If that issue had been left so as to include the lands, that is *all* the lands, mentioned in the complaint, it could not have been answered "Yes" in view of their actual finding. Their answer would necessarily have been "No," as they found that only a part of the lands were owned by the plaintiff. If upon a division of the issues the jury had found that the plaintiff owned *all* the lands in question, then it might have become the duty of the Court below to enter judgment for the trespass *non obstante veredicto* upon the admissions in the agreement, but unfortunately the facts as found do not fit the plaintiff's theory. The judgment will be modified and affirmed as directed in the defendant's appeal. In this appeal we see no error.

Modified and affirmed.

AMENDMENTS TO RULES.

(FOR THE OTHER RULES OF COURT IN FULL, SEE 128 N. C., 633).

The following are those Rules which have been amended since the Rules were revised and printed in full, 128 N. C., 633 (February Term, 1901):

APPLICANTS FOR LICENSE TO PRACTICE LAW.

RULE 1. *When Examined.* — Applicants for license to practice law will be examined on the first Monday in February and the last Monday in August of each year, and at no other time. All examinations will be in writing.

RULE 2. *Requirements and Course of Study.* — Each applicant must have attained the age of twenty-one years and must have studied the following, or their equivalents:

Ewell's Essentials, 3 volumes;
Clark on Corporations;
Schouler on Executors;
Bispham's Equity;
Clark's Code of Civil Procedure;
Volume 1, Code of North Carolina;
Constitution of North Carolina;
Constitution of the United States;
Sheppard's Constitutional Text Book;
Cooley's Principles of Constitutional Law;
Creasy's English Constitution;
Sharswood's Legal Ethics.

Each applicant must have read law for two years at least, and shall file with the Clerk a certificate of good moral character, signed by two members of the bar, who are practicing

attorneys of the Court; and also a certificate of the Dean of a Law School, or a member of the bar of this Court, that the applicant has read law under his instruction, or to his best information and belief, for two years, and upon examination by such instructor has been found competent and proficient in said course. Such certificate, while indispensable, will of course not be conclusive evidence of proficiency.

If the applicant has obtained license to practice law in another State, in lieu of the certificate of two years' reading and proficiency, he can file (with leave to withdraw) his law license issued by said State, but will be subject to the same examination as other applicants.

RULE 3. *Deposit.*—Each applicant shall deposit with the Clerk a sum of money sufficient to pay the license fee before he shall be examined, and if upon examination he shall fail to entitle himself to receive a license, the money will be returned to him.

RULE 27. *Exception—How Assigned.*—*Add* at the end of Rule 27: When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the Court when it is admitted, it will not be ground for exception that the Judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted.

RULE 28. *Printing Records—What to be Printed—Pauper Appeals.*—Fifteen copies of the entire transcript sent up in each action shall be printed, except in pauper appeals, and in these latter the Court desires the counsel for the appellant to furnish a sufficient number of printed or typewritten briefs for the use of the Court, giving a succinct statement of the

facts applicable to the exceptions, and the authorities relied on. Should the appellant gain the appeal the cost of the same shall be taxed against the appellee.

The printed transcript shall be in the order required by Rule 19 (1), and shall contain the marginal references and index required by Rule 19 (2) and 19 (3), though, for economy, the marginal references in the manuscript may be printed as subheads in the body of the record and not on the margin. The transcript shall be printed immediately after docketing the same, unless it is sent up ready printed.

RULE 32. *Printed Briefs.*—Printed briefs of both parties shall be filed in all cases, except in pauper appeals. Such briefs may be sent up by counsel ready printed, or they may be printed under the supervision of the Clerk of this Court, if a proper deposit for cost of printing is made, as specified in Rule 29. They must be of the size and style prescribed by that rule. The briefs are desired to cover all the points presented in the oral argument, though additional authorities may be cited if discovered after brief filed.

RULE 34. *Appellant's Brief.*—The brief of an appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions, except that as to an exception that there was no evidence, it shall be sufficient to refer to pages of printed transcript containing the evidence. Such brief shall contain, properly numbered, the several grounds of exceptions and assignments of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment, and, if statutes are material, the same shall be cited by the book, chapter and section. Such briefs, when filed, shall be noted by the Clerk on the docket, and a copy thereof furnished by him to opposite counsel on application. If not filed by 10 a. m. on Tuesday of the week preceding the call of the district to which the cause belongs, the appeal will be dismissed on motion of

appellee, when the call of that district is begun, unless, for good cause shown, the Court shall give further time to print brief.

RULE 36. *Appellee's Brief.*—Add to Rule 36, on page 645, 128 N. C., the following: Said briefs shall be filed before the beginning of the call of the district to which the cause belongs, shall be noted by the Clerk on his docket, and a copy furnished by him to opposite counsel on application. On failure to file said brief by that time the cause will be heard and disposed of without argument from appellee, unless, for good cause shown, the Court shall give further time to print brief.

RULE 37. *Cost of Brief.*—The actual cost of printing his brief, not exceeding fifty cents per page of the size of the pages in the North Carolina Reports, and not exceeding twenty pages, shall be allowed to the successful party, to be taxed in the bill of cost.

RULE 52. *Petition to Rehear—When Filed.*—A petition to rehear may be filed at the same term, or during the vacation succeeding the term of the Court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term. If such petition is ordered to be docketed by the Justices to whom it is submitted under Rule 53, such Justices may, upon such terms as they see fit, make an order restraining the issuing of an execution or the collection and payment of the same until the next term of said Court, or until the petition to rehear shall have been determined.

RULE 53. *Petition to Rehear — What to Contain.* — The petition must assign the alleged error of law complained of; or the matter overlooked; or the newly discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this

Court who have no interest in the subject-matter and have never been of counsel for either party to the suit, and each of whom shall have been at least five years a member of the bar of this Court, that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion, and they shall summarize succinctly in such certificate the points in which they deem the opinion erroneous.

The petitioner shall endorse upon the petition the names of two Justices, neither of whom dissented from the opinion, to whom the petition shall be sent by the Clerk, and it shall not be docketed for rehearing unless both of said Justices endorse thereon that it is a proper case to be reheard: *Provided, however,* that when there have been two dissenting Justices it shall be sufficient for the petitioner to designate only one Justice, and his approval in such case shall be sufficient to order the petition docketed. The Clerk shall endorse on the petition the date on which it was received, and it shall be delivered by him to one of the Justices designated by the petitioner. There will be no oral argument before the Justice or Justices thus designated before it is acted on by them, and if they order the petition docketed there shall be no oral argument thereon before the Court (unless the Court of its own motion shall direct an oral argument), but it shall be submitted upon the record at the former hearing, the printed petition to rehear and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but shall be new briefs, directed to the errors assigned in the petition, and shall be printed. If not printed and filed in the prescribed time by the petitioner, the petition will be dismissed, and for default in either particular

by the respondent the cause will be disposed of without such brief.

The petition may be ordered docketed for a rehearing as to all the points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points thus certified, as may be directed by the Justices who grant the application. When a petition to rehear is ordered to be docketed notice shall at once be given to counsel on both sides by the Clerk of this Court.

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A

ACCOUNTS.

An account filed by an executor is only *prima facie* correct, and he is not estopped to impeach it. *Bean v. Bean*, 92.

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Battle's Revisal, ch. 35, sec. 14, providing for the acknowledgment of deeds of married persons before probate judges, does not apply to deeds of unmarried men. *Westfeldt v. Adams*, 591.

A commissioner of deeds for this state, residing in another state, is not required to affix his seal to the certificate acknowledging the execution of a deed conveying land in this state. *Johnson v. Duvall*, 642.

ACTIONS.

Where two causes of action are improperly joined, but one of them because of the amount involved is not within the jurisdiction of the court, it is dismissable as to the one over which the court has no jurisdiction. *Railroad Co. v. Hardware Co.*, 73.

It is a misjoinder of causes of action to unite in one suit a cause of action for wrongful attachment and one against the surety for a breach of the attachment bond. *Railroad Co. v. Hardware Co.*, 73.

Where a nonsuit is granted upon a demurrer to the evidence, a new action may be brought within one year. *Hood v. Telegraph Co.*, 622.

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ADMISSIONS.

The admission of incompetent evidence, which is subsequently excluded, is harmless error. *Cowles v. Lovin*, 488.

AGENCY.

If a principal receives goods purchased by an agent and appropriates them to his use, he is liable therefor, unless he can show that he furnished his agent with the necessary funds, but that the agent bought on credit, of which fact the principal had no notice. *Brittain v. Westhall*, 492.

Checks issued by an agent bearing an entry in the hand-writing of the plaintiff that they were given for timber bought for the defendant are competent only to corroborate the evidence of the plaintiff that he was told so by the agent. *Brittain v. Westhall*, 492.

In an action to recover a balance due for lumber, the evidence is sufficient to be submitted to the jury on the question whether the buyer was the agent of the defendant. *Brittain v. Westhall*, 492.

Where one who was an agent for another for the sale of goods mixed such goods with his own stock of goods, the title of his principal attached to the whole stock until the value of his

AGENCY—*Continued.*

goods were returned to him or properly accounted for. *Lance v. Butler*, 419.

The proceeds of sales made by an agent are a trust fund in the hands of the agent, except as to his commissions for selling. *Lance v. Butler*, 419.

AMENDMENT.

Where a demurrer was sustained to a complaint for libel against a newspaper because it failed to appear that notice of the action had been given, the trial court may permit an amendment showing that fact. *Osborn v. Leach*, 628.

Where a verdict finds that the grantor was induced by fraud to execute a deed, the trial judge should permit the complaint to be so amended as to conform to the verdict, as on the allegations and verdict the equity of the grantor was one for reformation and not for cancellation, though the action was brought for cancellation of the deed. *Gillis v. Arringdale*, 296.

APPEAL. See "Case on Appeal."

The supreme court, on a second appeal, is not precluded under the doctrine of the law of the case from passing on a question not determined on the first appeal. *Vann v. Edwards*, 661.

In the case on appeal only enough of the record should be included to show that the case is properly constituted; and this, with the summons, pleadings, verdict and judgment, and the case on appeal setting out so much of the proceedings at the trial as will throw light upon the exceptions taken, is all that is necessary. *Sigman v. Railroad*, 181.

The erroneous exclusion of evidence is not reversible error when such evidence is afterwards admitted. *Kelly v. Johnson*, 650.

An exception that the court erred in its charge to the jury is too broad to be considered on appeal. *Sigman v. Railroad Co.*, 181.

Appeals will be dismissed where no index is sent up in the record and printed, and no marginal references prepared. *Sigman v. Railroad Co.*, 181.

A finding of facts by the trial judge by consent of parties is conclusive on appeal where there is any evidence to sustain the same. *Commissioners v. Packing Co.*, 62.

Where hearsay evidence is admitted without objection and considered by the jury, an objection thereto will not be considered on appeal. *Holder v. Manufacturing Co.*, 392.

Where a *recordari* is ordered as a substitute for an appeal, but is not docketed, the appellee has a right to docket the case and

APPEAL—*Continued.*

have it dismissed at any succeeding term of the court. *Johnson v. Reformers*, 385.

A finding of facts by the trial judge by consent of parties is conclusive on appeal where there is any evidence to sustain the same. *Commissioners v. Packing Co.*, 62.

Where a verdict is set aside for a supposed error of law, an appeal lies therefrom. *Johnson v. Reformers*, 385.

No appeal lies from a refusal to dismiss an action, but an exception should be taken and the trial proceeded with. *Johnson v. Reformers*, 385.

ASSESSMENTS.

Acts 1903, ch. 251, provides a plain and adequate remedy at law to test the validity and regularity of a tax assessment, and it cannot be tested by an injunction. *Wilson v. Green*, 343.

ASSIGNMENTS.

The knowledge by the *bona fide* assignee of a note of the crookedness in business matters of the assignor does not defeat the title of the assignee or make it his duty to enquire relative to the note. *Setzer v. Deal*, 428.

That the maker of a note does business near the assignee is immaterial on the question as to whether the assignee was a *bona fide* holder. *Setzer v. Deal*, 428.

ASSUMPTION OF RISK.

In an action for injuries to a servant, contributory negligence is an affirmative defense, and any issue thereon must be tendered by defendant in order to be available. *Womble v. Grocery Co.*, 474.

A servant employed to operate a freight elevator does not assume the risk of injury owing to a fall of the elevator, in the absence of knowledge of any defect therein, and of any duty to inspect it. *Womble v. Grocery Co.*, 474.

Under the act depriving railroad companies of the defense of assumption of risk, a railroad company cannot plead such defense to an action by an employee for injuries from a defective sand-dryer. *Walker v. Railroad Co.*, 778.

In this action against a railroad company for wrongfully killing an engineer the instructions as to assumption of risk and contributory negligence are correct. *Harrill v. Railroad*, 601.

ATTACHMENT.

An action against a surety on an attachment bond in the penal sum of $200, being *ex contractu*, must be brought before a justice of the peace. *Railroad Co. v. Hardware Co.*, 73.

It is a misjoinder of parties to bring a suit for damages against a person suing out an attachment and the surety on the attachment bond. *Railroad Co. v. Hardware Co.*, 73.

It is a misjoinder of causes of action to unite in one suit a cause of action for wrongful attachment and one against the surety for a breach of the attachment bond. *Railroad Co. v. Hardware Co.*, 73.

ATTORNEY AND CLIENT.

A statement by a client to his attorney that he had procured a loan of some money to pay a fee in a case settled up is not a privileged communication. *Eekhout v. Cole*, 583.

B

BANKS AND BANKING.

While there is no necessity for joining creditors of a bank as parties plaintiff in a suit brought by the receiver to enforce the stockholders' double liability, such joinder is not prejudicial to the defendant. *Smathers v. Bank*, 410.

A receiver for an insolvent bank is the proper party to bring an action against the stockholders to enforce their double liability. *Smathers v. Bank*, 410.

Acts 1897, ch. 298, imposing on stockholders in banks a double liability, does not fix such liability for debts contracted prior to the enactment of the statute, but does apply to stockholders of banks organized before the passage of the act. *Smathers v. Bank*, 410.

In an action by the receiver to enforce the double liability imposed on bank stockholders, the complaint should state the time when the several defendants became stockholders and when the debts were contracted. *Smathers v. Bank*, 410.

The better practice to enforce the double liability imposed on bank stockholders is to obtain the desired relief in a creditors' bill, where such has been brought, instead of an independent action by the receiver. *Smathers v. Bank*, 410.

BENEFICIARIES.

Where it was agreed at the time application for a life policy was made that a person having no insurable interest in the life of

BENEFICIARIES—*Continued.*

the insured should pay all the premiums and receive the proceeds of the policy, it was void. *Hinton v. Insurance Co.*, 314.

BILLS AND NOTES. See "Negotiable Instruments."

BONDS.

A complaint by a board of county commissioners to enjoin the treasurer from paying interest on county bonds sought to be invalidated, which fails to allege that he has any funds applicable to such purpose, or that he threatens or purposes to pay any public funds on the bonds or interest, is fatally defective. *Commissioners v. Williams*, 660.

The providing of a system for lighting the streets of a town is a necessary expense, for which bonds may be issued without submitting the proposition to a vote of the people. *Davis v. Fremont*, 538.

Where the charter of a city provides that bonds for electric lights may be issued when submitted to and approved by the voters, the city cannot issue such bonds without such vote. *Robinson v. Goldsboro*, 382.

It is a misjoinder of parties to bring a suit for damages against a person suing out an attachment and the surety on the attachment bond. *Railroad Co. v. Hardware Co.*, 73.

It is a misjoinder of causes of action to unite in one suit a cause of action for wrongful attachment and one against the surety for a breach of the attachment bond. *Railroad Co. v. Hardware Co.*, 73.

A tax payer may enjoin county commissioners from making a tax levy to pay interest on railroad bonds issued under an unconstitutional statute, without restoring to the *bona fide* holders of the bonds the consideration paid therefor. *Graves v. Commissioners*, 49.

Where the recitals in railroad bonds are that they were issued under a particular act of the legislature, the burden of validating them as made under sec. 1996 of The Code is on the party alleging their validity. *Graves v. Commissioners*, 49.

Prior to November 1, 1886, it had not been decided that an act ratified by the presiding officers of the general assembly was conclusive evidence that the same had been passed in accordance with the constitution. *Graves v. Commissioners*, 49.

An act "authorizing and empowering" county commissioners to issue bonds is not mandatory. *Jones v. Commissioners*, 218.

BONDS—*Continued.*

A mandamus is the proper remedy to compel county commissioners to issue bonds ordered by the general assembly. *Bank v. Commissioners,* 230.

An action by the ward against the sureties on the bond of the guardian is barred after three years from the time the ward becomes twenty-one years old if the guardian makes no final settlement; and within six years if the guardian makes a final settlement. *Self v. Shugart,* 185.

A complaint by a board of county commissioners to enjoin the treasurer from paying interest on county bonds sought to be invalidated, which fails to allege that he has any funds applicable to such purpose, or that he threatens or purposes to pay any public funds on the bonds or interest, is fatally defective. *Commissioners v. Williams,* 660.

The county commissioners are not authorized to issue bonds on the credit of a township for the construction of a railroad. *Graves v. Commissioners,* 49.

The Code, sec. 1996, does not authorize the county commissioners to issue bonds in aid of the "construction" of a railroad not yet begun. *Graves v. Commissioners,* 49.

BOUNDARIES.

It is not competent in an action of ejectment for a witness to state that his father pointed toward the land in question and said the reason he did not enter it was that it was covered by other grants, this being hearsay evidence. *Westfeldt v. Adams,* 591.

The compensation received by a surveyor of land involved in ejectment is not such a disqualifying interest as to render proof of a declaration by the surveyor as to the boundary incompetent. *Westfeldt v. Adams,* 591.

BURDEN OF PROOF.

In an action for libel against a newspaper, the paper having pleaded a retraction of the publication, it is necessary for the defendant to show that the publication was made in good faith, and with reasonable ground to believe it to be true, in order to relieve the paper from punitive damages. *Osborn v. Leach,* 628.

Where a party admits the execution of a note, the burden of showing payment is on the payor. *Guano Co. v. Marks,* 59.

Proof or admission that a telegraph company received a message for transmission, and failed to deliver it to the sendee within a reasonable time, makes a *prima facie* case of negligence, and imposes on the company the burden of alleging and proving

BURDEN OF PROOF—*Continued.*

such facts as it may rely on in excuse. *Cogdell v. Telegraph Co.*, 431.

The burden of proving that a statute was not passed in accordance with the constitution is on the person alleging its invalidity. *Commissioners v. Packing Co.*, 62.

The burden of showing that a contract was changed by mutual consent is on the person alleging the same. *Johnson v. Reformers*, 385.

A publication by a newspaper that a director of the state's prison is guilty of a gross breach of official duty and the receipt of money illegally is libelous *per se*, and the burden is on the defendant to prove the truth thereof or matter in mitigation. *Osborn v. Leach*, 628.

Where the recitals in railroad bonds are that they were issued under a particular act of the legislature, the burden of validating them as made under sec. 1996 of The Code is on the party alleging their validity. *Graves v. Commissioners*, 49.

C

CANCELLATION OF INSTRUMENTS. See "Reformation of Instruments."

In an action to cancel a deed for the fraud of the grantee, the grantor in this case is entitled to such damages as the grantee might have done to the land. *Gillis v. Arringdale*, 295.

In this suit for the cancellation of a conveyance and for damages, an issue as to what consideration defendant agreed to pay for the land was properly submitted. *Gillis v. Arringdale*, 295.

In this action to cancel a mortgage for fraud, the evidence is sufficient to be submitted to the jury. *Hill v. Gettys*, 373.

The rendition of a judgment by default final at the return term in an action to cancel a deed is an irregularity for which it should be set aside. *Junge v. MacKnight*, 105.

Where one tenant in common obtains judgment against a co-tenant for the cancellation of a deed, the co-tenant is not estopped to claim title under the deed as against other co-tenants not parties. *Allred v. Smith*, 443.

While a court of equity will not cancel a mortgage for lack of consideration, yet when a jury shall find that it was procured by fraud and fraudulent representations that the mortgagee would pay the consideration, a court of equity will grant the relief. *Hill v. Gettys*, 373.

CANCELLATION OF INSTRUMENTS—*Continued.*

In an action for the cancellation of a deed, the grantee is entitled to reduce the damage to the land by the enhanced value of the same from improvements placed thereon. *Gillis v. Arringdale*, 295.

CARRIERS. See "Assumption of Risk"; "Contributory Negligence"; "Negligence"; "Damages"; "Railroads."

An editor of a newspaper riding on a pass issued contrary to law may recover for injuries received through the negligence of the carrier, as the duty to carry passengers safely exists independently of contract. *McNeill v. Railroad Co.*, 682.

Where a carrier wrongfully refuses to deliver freight because the owner declines to pay an alleged overcharge in freight, such carrier cannot avoid payment of damages for injury to the freight by showing that the owner did not have the bill of lading at the time he demanded the goods. *Clegg v. Railroad Co.*, 148.

A consignee who entered into a contract for the transfer of cars to his own yard on a switch, and was fully apprised of charges to be made, and paid them, could not recover them as paid under protest, though at the time of making the contract he said that he would pay the charges under protest. *Bernhardt v. Railroad Co.*, 258.

A person who gets on a blind baggage car, though having a ticket, but not having told the conductor that he had it, and the conductor not having seen it, is not entitled to recover as a passenger for injuries received by being pulled off the train by the conductor. *McGraw v. Railroad Co.*, 264.

Where a carrier sells mileage, and the purchaser dies, the carrier is not required to carry the body of the deceased purchaser on such mileage. *Minnish v. Railroad Co.*, 342.

In an action for a penalty, the complaint alleging the tender on a specified day, and that the defendant on the two following days "failed and refused to receive the same," is a sufficient allegation of tender for the last two days. *Currie v. Railroad Co.*, 535.

Where a car of lumber tendered to a railroad company for transportation was found to have been properly loaded, the carrier was liable for the penalty for refusal to receive the same for transportation, notwithstanding the car was to be shipped out of the State. *Currie v. Railroad Co.*, 535.

CASE ON APPEAL. See "Appeal."

Where the case on appeal states that an instruction was not given as set forth in an exception, it will not be considered. *Cowles v. Lovin*, 488.

The exceptions in a case on appeal must be briefly and clearly stated and numbered. *Sigman v. Railroad*, 181.

Appeals will be dismissed where no index is sent up in the record and printed, and no marginal references prepared. *Sigman v. Railroad Co.*, 181.

In the case on appeal only enough of the record should be included to show that the case is properly constituted; and this, with the summons, pleadings, verdict and judgment, and the case on appeal setting out so much of the proceedings at the trial as will throw light upon the exceptions taken, is all that is necessary. *Sigman v. Railroad*, 181.

CITIES. See "Municipal Corporations."

CLOUD ON TITLE. See "Quieting Title."

Where the taxes, interest and costs for which land was sold were paid by the tax debtor during the year allowed for redemption, the tax deed, valid on its face, constituted a cloud on the title. *Beck v. Meroney*, 532.

COLOR OF TITLE. See "Quieting Title."

COMMISSIONS.

Where a guardian uses funds of his ward, but makes regular annual settlements, charging himself with interest thereon, he is entitled to his commissions. *Fisher v. Brown*, 198.

COMPROMISE AND SETTLEMENT.

In an action for the reformation of a deed as to the consideration the grantor is not bound to accept a proposition to compromise not in accordance with his claim. *Gillis v. Arringdale*, 296.

CONFUSION OF GOODS.

Where one who was the agent for the sale of goods for another allowed them to be mixed with his stock of goods, and then gave a mortgage on the entire stock, the mortgagee obtained no better title than the mortgagor had. *Lance v. Butler*, 420.

Where one who was an agent for another for the sale of goods mixed such goods with his own stock of goods, the title of his principal attached to the whole stock until the value of his goods were returned to him or properly accounted for. *Lance v. Butler*, 419.

CONSIDERATION.

Where the grantee in a deed agrees, as a part of the consideration, to support the grantor, which he fails to do, and the grantor executes another deed to a third person, the second grantee is not subrogated to the rights of the grantor to enforce her claim for support. *Helms v. Helms*, 164.

The release of a dower by a wife is a valuable consideration for a note executed by her husband to her. *Trust Co. v. Benbow*, 303.

In an action to reform a deed, if defendant elects to take a certain share of the premises he would be required to pay one of the plaintiffs, who claimed such share through title paramount to the defendant's, at a price based on the consideration expressed after reformation. *Gillis v. Arringdale*, 296.

In an action for the reformation of a deed, one of the plaintiffs could not compel the defendant to take a share of the premises acquired by foreclosure at the price expressed in the deed. *Gillis v. Arringdale*, 296.

In this suit for the cancellation of a conveyance and for damages, an issue as to what consideration defendant agreed to pay for the land was properly submitted. *Gillis v. Arringdale*, 295.

Where the grantee in a deed agrees, as a part of the consideration, to support the grantor, which he fails to do, and the grantor executes another deed to a third person, the second grantee is not subrogated to the rights of the grantor to enforce her claim for support. *Helms v. Helms*, 164.

In an action for the reformation of a deed as to the consideration, the value of the land and what the grantor would have sold it for at the time of the execution of the deed is competent in corroboration of the evidence of the grantor as to the consideration. *Gillis v. Arringdale*, 295.

While a court of equity will not cancel a mortgage for lack of consideration, yet when a jury shall find that it was procured by fraud and fraudulent representations that the mortgagee would pay the consideration, a court of equity will grant the relief. *Hill v. Gettys*, 373.

CONSTITUTION OF NORTH CAROLINA.

Art. I, sec. 11. Contempt. *In re Briggs*, 118.
Art. I, sec. 17. Swamp lands. *Lumber Co. v. Lumber Co.*, 742.
Art. I, secs. 20, 35. Libel. *Osborn v. Leach*, 628.
Art. II, sec. 14. Contracts. *Graves v. Commissioners*, 49.
Art. V, sec. 3. Ordinances. *Plymouth v. Cooper*, 1.
Art. V, sec. 6. Counties. *Jones v. Commissioners*, 224.

CONSTITUTION OF NORTH CAROLINA—*Continued.*

Art. VIII, sec. 4. Municipal corporation. *Robinson v. Goldsboro,* 383.

Art. X, sec. 6. Married women. *Vann v. Edwards,* 661.

Art. XIV, sec. 3. Counties. *Martin v. Clark,* 178.

CONSTITUTION OF THE UNITED STATES.

Art. I, sec. 8. Interstate commerce. *Range Co. v. Campen,* 506.

Fifth amendment. Contempt. 118.

CONSTITUTIONAL LAW.

An act taking away from a person the right to recover punitive damages in case of libel is constitutional. *Osborn v. Leach,* 628.

An act providing that the owner of swamp lands failing to pay certain taxes shall forfeit the land to the state board of education is not constitutional. *Lumber Co. v. Lumber Co.,* 742.

Where a statute for libel applies equally to all newspapers and periodicals, it does not amount to an unconstitutional discrimination. *Osborn v. Leach,* 628.

An act levying a tax upon all clams and oysters shipped out of a county is constitutional. *Brooks v. Tripp,* 159.

CONTEMPT.

The Code, sec. 1115, requiring a witness to testify touching any unlawful gaming done by himself or others, is not unconstitutional by reason of the fifth amendment to the constitution of the United States or Art. I, sec. 11, of the constitution of North Carolina, for the reason that the said statute grants a pardon to the witness. *In re Briggs,* 118.

CONTRACTS.

Prior to November 1, 1886, it had not been decided that an act ratified by the presiding officers of the general assembly was conclusive evidence that the same had been passed in accordance with the constitution. *Graves v. Commissioners,* 49.

The burden of showing that a contract was changed by mutual consent is on the person alleging the same. *Johnson v. Reformers,* 385.

An editor of a newspaper riding on a pass issued contrary to law may recover for injuries received through the negligence of the carrier, as the duty to carry passengers safely exists independently of contract. *McNeill v. Railroad Co.,* 682.

A deposit by a person under a previous contract, the same being for the performance of the contract and withdrawn by mutual

CONTRACTS—*Continued.*

consent and loaned to the other party to the contract, is a valid claim against the estate of the lendee. *Eekhout v. Cole*, 583.

The withdrawal by mutual consent of a deposit by a person, the same being for the performance of a contract, is not conclusive evidence that the agreement of forfeiture should no longer be a part of the contract. *Eekhout v. Cole*, 583.

Under a contract with a water company to supply water for extinguishing fires, requiring that it shall provide pressure on four minutes' notice to throw ten streams at a certain height, a property owner, suing for damages for failure to furnish water for the extinguishment of a fire, need not show that notice was given the company; as such provision was for an extraordinary pressure to show the capacity of the plant. *Jones v. Water Co.*, 553.

A consignee who entered into a contract for the transfer of cars to his own yard on a switch, and was fully apprised of charges to be made, and paid them, could not recover them as paid under protest, though at the time of making the contract he said that he would pay the charges under protest. *Bernhardt v. Railroad Co.*, 258.

In the absence of special circumstances, the measure of damages for breach of warranty as to the quality or capacity of machinery sold is the difference between the contract price and the actual value, with special damages which were in contemplation of the parties. *Critcher v. Porter Co.*, 542.

Evidence that a policy of insurance was not purchased for the benefit of the insured, and that the insured did not pay the premiums, is not incompetent as tending to vary the terms of a written contract. *Hinton v. Insurance Co.*, 314.

One who occupies land under a parol contract of purchase and who has made valuable improvements thereon, is entitled, on interpleading in a suit by a subsequent purchaser for specific performance, to the value of his improvements, to be deducted from the balance of the purchase-money due from plaintiff, who, under his contract, is entitled to a deed with full covenants of warranty. *Kelly v. Johnson*, 647.

Where a water company contracts with a town to furnish water at a certain pressure for the purpose of extinguishing fires, a citizen injured by a failure of the company to furnish the water as contracted may recover in his own name for the injury. *Jones v. Water Co.*, 553.

CONTRACTS—*Continued.*

A railroad corporation operating a road jointly with another corporation is responsible for injury to its employees, as a natural person would be for the liabilities of a firm of which he is a member. *Harrill v. Railroad Co.*, 601.

A mutual order for insurance cannot change its constitution subsequent to the contract with one of its members and to his detriment except by mutual consent. *Johnson v. Reformers*, 385.

Where machinery fails to come up to the warranty thereof, the buyer may refuse to keep it, and recover for the amount paid thereon, together with such damages as he sustained and which were in contemplation of the parties. *Critcher v. Porter Co.*, 542.

In an action for breach of warranty as to saw-mill machinery the purchaser cannot recover for loss of profits on lumber contracted to be sold, if the contract was not known to the seller. *Critcher v. Porter Co.*, 542.

Where a carrier sells mileage, and the purchaser dies, the carrier is not required to carry the body of the deceased purchaser on such mileage. *Minnish v. Railroad*, 342.

An agreement whereby one is to receive part of the profits of an enterprise as a means only of ascertaining his compensation does not create a partnership. *Lance v. Butler*, 419.

Where a person buys cotton "futures" for another and suffers loss, he cannot maintain an action for reimbursement. *Garseed v. Sternberger*, 501.

In an action for trespass on lands counsel agreed that if the jury should answer the first issue as to title "yes," then it was admitted that defendant had trespassed and that the amount of damages should be ascertained under The Code. The first issue was whether plaintiff was the owner of the lands described in the complaint or any part thereof. The second was, "If so, what part?" It was not error to submit a third issue as to whether defendant had trespassed on lands described in the complaint, and which were inside a certain grant to plaintiff, where it appeared to the court that the evidence raised a question as to whether defendant might not have trespassed on lands described in the complaint, but which it might be found were not within the grant and did not belong to plaintiff. *Lumber Co. v. Lumber Co.*, 744.

CONTRIBUTORY NEGLIGENCE. See "Negligence"; "Last Clear Chance"; "Damages"; "Railroads."

A servant employed to operate a freight elevator does not assume the risk of injury owing to a fall of the elevator, in the absence

CONTRIBUTORY NEGLIGENCE—*Continued.*

of knowledge of any defect therein, and of any duty to inspect it. *Womble v. Grocery Co.*, 474.

In this action to recover for injuries from unboxed cog-wheels the trial judge properly refused to nonsuit the plaintiff. *Creech v. Cotton Mills*, 680.

In an action by an operative in a mill for personal injuries the plaintiff cannot recover unless she exercises that care which an ordinarily prudent person would or should have exercised. *Creech v. Cotton Mills*, 680.

In this action against a railroad company for wrongfully killing an engineer, the instructions as to assumption of risk and contributory negligence are correct. *Harrill v. Railroad Co.*, 601.

One walking or sitting or lying down on a railroad track is guilty of contributory negligence. *Carter v. Railroad Co.*, 498.

In this action for injuries received from a sand-dryer the trial judge properly instructed the jury that there was no evidence of contributory negligence. *Walker v. Railroad Co.*, 738.

While an instruction to the jury in a personal injury case to answer the issue of contributory negligence "no" is bad in form, yet it is not ground for reversal, where there is in fact an entire absence of evidence of contributory negligence. *Walker v. Railroad Co.*, 738.

Where the evidence tends to show that the intestate was helpless on the railroad track and could have been seen in time to stop the train, the plaintiff may recover for the death of the intestate on the ground of the "last clear chance." *Carter v. Railroad Co.*, 498.

CONVERSION.

Where one not the owner of goods gave a mortgage thereon, and the true owner sued the mortgagee in conversion, a request for an issue as to whether plaintiff was damaged by the sale, and, if so, how much, was proper. *Lance v. Butler*, 419.

In an action for damages for conversion the jury may allow interest on the amount of the damages from the time of the conversion. *Lance v. Butler*, 419.

In an action for damages for conversion, the verdict being the value of the property at the time of the conversion, interest can only begin from the time of the judgment. *Lance v. Butler*, 419.

CORPORATIONS. See "Banks and Banking"; "Stockholders."

Acts 1901, ch. 91, levying an annual franchise tax on corporations is lawful and applies to foreign corporations doing business in this state. *Comrs. v. Packing Co.*, 62.

Acts 1897, ch. 298, imposing on stockholders in banks a double liability, does not fix such liability for debts contracted prior to the enactment of the statute, but does apply to stockholders of banks organized before the passage of the act. *Smathers v. Bank*, 410.

Where a dissolution of a firm occurs by operation of law, by the death of one of the partners, the giving of notice of such dissolution is not necessary to prevent liability from attaching to the estate of the deceased partner or of the surviving partners for any future contracts made in the name of the firm. *Bank v. Hollingsworth*, 556.

A foreign corporation may be sued in this state though it has not been domesticated. *Johnson v. Reformers*, 385.

CORROBORATION OF WITNESSES. See "Witnesses."

The rule of the supreme court relieving the trial judge of the duty of instructing specially upon the nature of corroborative or impeaching evidence, unless specially requested, does not apply to a case where the trial judge in his charge marshals impeaching evidence along with substantive evidence without calling attention thereto. *Westfeldt v. Adams*, 571.

CORROBORATIVE EVIDENCE. See "Evidence."

Checks issued by an agent bearing an entry in the hand-writing of the plaintiff that they were given for timber bought for the defendant, are competent only to corroborate the evidence of the plaintiff that he was told so by the agent. *Britain v. Westhall*, 492.

In an action for the reformation of a deed as to the consideration, the value of the land and what the grantor would have sold it for at the time of the execution of the deed is competent in corroboration of the evidence of the grantor as to the consideration. *Gillis v. Arringdale*, 296.

COSTS.

Though a witness can prove his attendance against the party who subpœnas him, such attendance cannot be taxed as costs against the opposite party in case he loses, unless the witness was examined at the trial or was tendered to such opposite party. *Sitton v. Lumber Co.*, 540.

COUNTY COMMISSIONERS.

The Code, sec. 1996, does not authorize the county commissioners to issue bonds in aid of the "construction" of a railroad not yet begun. *Graves v. Comrs.*, 49.

A mandamus is the proper remedy to compel county commissioners to issue bonds ordered by the general assembly. *Jones v. Commissioners*, 218.

A mandamus will lie to compel a county treasurer to pay a warrant out of a specific fund, the warrant having been drawn by the county commissioners. *Martin v. Clark*, 178.

The county commissioners are not authorized to issue bonds on the credit of a township for the construction of a railroad. *Graves v. Comrs.*, 49.

Under acts 1903, ch. 233, a *mandamus* will not lie to control the discretion of the county commissioners in the matter of granting liquor licenses. *Barnes v. Comrs.*, 27.

An act "authorizing and empowering" county commissioners to issue bonds is not mandatory. *Jones v. Comrs.*, 218.

A *mandamus* will not lie to control the discretion given the county commissioners in issuing liquor license under acts 1903, ch. 233. *Bridgers v. Comrs.*, 25.

CREDITORS' BILL.

The better practice to enforce the double liability imposed on bank stockholders is to obtain the desired relief in a creditors' bill, where such has been brought, instead of an independent action by the receiver. *Smathers v. Bank*, 410.

D

DAMAGES. See "Contributory Negligence"; "Negligence"; "Railroads."

In an action for damages for causing the discharge of an employee, actual malice need not be shown, it being sufficient if the act is done without legal excuse. *Holder v. Mfg. Co.*, 392.

In an action for damages for causing plaintiff's discharge by his employer, a charge that, if the same person was assistant manager of defendant and of plaintiff's employer, and of his own motion directed plaintiff's discharge, the jury should find for defendant, was properly modified by inserting before the concluding phrase, "without demand or direction of the defendant." *Holder v. Mfg. Co.*, 392.

An editor of a newspaper riding on a pass issued contrary to law may recover for injuries received through the negligence of the

DAMAGES—*Continued.*

carrier, as the duty to carry passengers safely exists independently of contract. *McNeill v. Railroad Co.*, 682.

Where machinery fails to come up to the warranty thereof, the buyer may refuse to keep it, and recover for the amount paid thereon, together with such damages as he sustained and which were in contemplation of the parties. *Critcher v. Porter Co.*, 542.

In an action to cancel a deed for the fraud of the grantee, the grantor in this case is entitled to such damages as the grantee might have done to the land. *Gillis v. Arringdale*, 295.

A person who gets on a blind baggage car, though having a ticket, but not having told the conductor that he had it, and the conductor not having seen it, is not entitled to recover as a passenger for injuries received by being pulled off the train by the conductor. *McGraw v. Railroad Co.*, 264.

In an action for damages for conversion the jury may allow interest on the amount of the damages from the time of the conversion. *Lance v. Butler*, 419.

In an action against a teacher for injuries to a pupil, caused by the teacher throwing a pencil at the pupil, which permanently injured his eye, an instruction that unless the jury found that a reasonably prudent man might reasonably or in the exercise of ordinary care have expected that the injury complained of would result from his act in throwing the pencil, defendant should be found not liable, was erroneous. *Drum v. Miller*, 204.

An act done by a teacher in the exercise of his authority, and not prompted by malice, is not actionable, though it may cause permanent injury, unless a person of ordinary prudence could reasonably have foreseen that a permanent injury would naturally or probably result from the act. *Drum v. Miller*, 204.

In the absence of special circumstances, the measure of damages for breach of warranty as to the quality or capacity of machinery sold is the difference between the contract price and the actual value, with special damages which were in contemplation of the parties. *Critcher v. Porter Co.*, 542.

In an action against a telegraph company to recover damages for failure to deliver a message announcing the death of a person, the plaintiff cannot recover his expenses in going to the deceased. *Hunter v. Telegraph Co.*, 458.

In an action for damages for conversion, the verdict being the value of the property at the time of the conversion, interest can only begin from the time of the judgment. *Lance v. Butler*, 419.

DAMAGES—*Continued.*

In an action for damages caused by a dam across a stream, an instruction that the party alleging damages must prove the same to the satisfaction of the jury, where the trial judge charged that the burden was on him and defined a preponderance of evidence, is not objectionable. *Chaffin v. Mfg. Co.*, 95.

An instruction that to entitle a plaintiff to nominal damages he must show damages capable of being estimated, perceptible, as an appreciable quantity, is erroneous. *Chaffin v. Mfg. Co.*, 95.

A person cannot recover damages for mental anguish by reason of a telegraph company delaying the delivery of a message relating to business, though mental anguish was suffered by the sender occasioned by the misapprehension as to the meaning of the message. *Bowers v. Telegraph Co.*, 504.

In an action for the cancellation of a deed, the grantee is entitled to reduce the damage to the land by the enhanced value of the same from improvements placed thereon. *Gillis v. Arringdale*, 295.

Where a telegraph company failed to make any attempt to deliver a message because the sendee lived beyond the free delivery limits and also failed to notify the sender of additional charges for such delivery, or of refusal to deliver it at all, the company is liable for damages resulting from its negligence in failing to make the delivery. *Hood v. Telegraph Co.*, 622.

In an action to recover damages for injuries by ponding water on land, the judgment set out in this case does not estop the plaintiffs from recovering permanent damages. *Candler v. Electric Co.*, 12.

In an action for damages by a dam across a stream, it is competent to show the condition of the banks of the stream above and below the dam in order to show that this condition was not caused by the erection of the dam. *Chaffin v. Mfg. Co.*, 95.

Where a carrier wrongfully refuses to deliver freight because the owner declines to pay an alleged overcharge in freight, such carrier cannot avoid payment of damages for injury to the freight by showing that the owner did not have the bill of lading at the time he demanded the goods. *Clegg v. Railroad Co.*, 148.

Actual damages include pecuniary loss, physical pain, mental suffering, and injury to reputation. *Osborn v. Leach*, 628.

In an action for damages caused by a dam across a stream, it is not competent to show the effect of the increased benefit of

DAMAGES—*Continued.*

the water on the lands of adjoining owners. *Chaffin v. Mfg. Co.*, 95.

In an action for libel against a newspaper the failure to give notice of the action as required only relieves the paper of punitive damages. *Osborn v. Leach*, 628.

In an action for breach of warranty on the sale of an engine for use in a saw-mill plaintiff is entitled to interest on the amount invested in the mill for the time it was idle. *Critcher v. Porter Co.*, 543.

In an action for breach of warranty on the sale of an engine for use in a saw-mill, under a warranty that it will develop a certain horse-power, or that defendant will make it do so, the plaintiff is entitled to recover expenses incurred in running the mill at the request of the defendant. *Critcher v. Porter Co.*, 543.

In an action for breach of warranty as to saw-mill machinery the purchaser cannot recover for loss of profits on lumber contracted to be sold, if the contract was not known to the seller. *Critcher v. Porter Co.*, 542.

One suffering peculiar injury from a public nuisance is not restricted to an action for damages, but may sue for an injunction. *Reyburn v. Sawyer*, 328.

An act taking away from a person the right to recover punitive damages in case of libel is constitutional. *Osborn v. Leach*, 628.

In an action for trespass on lands counsel agreed that if the jury should answer the first issue as to title "yes" then it was admitted that defendant had trespassed and that the amount of damages should be ascertained under The Code. The first issue was whether plaintiff was the owner of the lands described in the complaint or any part thereof. The second was, "If so, what part?" It was not error to submit a third issue as to whether defendant had trespassed on lands described in the complaint, and which were inside a certain grant to plaintiff, where it appeared to the court that the evidence raised a question as to whether defendant might not have trespassed on lands described in the complaint, but which it might be found were not within the grant and did not belong to plaintiff. *Lumber Co. v. Lumber Co.*, 744.

DECLARATIONS. See "Evidence."

A declaration, by a grantee in a deed duly recorded, to the effect that he does not claim any interest in the land conveyed, does

DECLARATIONS—*Continued.*

not operate as an estoppel *in pais* in favor of a subsequent grantee from the same grantor, having actual notice of the prior deed. *Helms v. Helms*, 164.

DEDICATION.

The complaint in this action to restrain the closing of an alley is not sufficient to show an easement in the plaintiff, the adjoining land owner, entitling him to enjoin the obstruction thereof. *Milliken v. Denny*, 19.

An alley is not necessarily a street and the public have not necessarily a right to its use. *Milliken v. Denny*, 19.

DEEDS.

Battle's Revisal, ch. 35, sec. 14, providing for the acknowledgment of deeds of married persons before probate judges, does not apply to deeds of unmarried men. *Westfeldt v. Adams*, 591.

A commissioner of deeds for this state, residing in another state, is not required to affix his seal to the certificate acknowledging the execution of a deed conveying land in this state. *Johnson v. Duvall*, 642.

Where the grantee in a deed agrees, as a part of the consideration, to support the grantor, which he fails to do, and the grantor is not subrogated to the rights of the grantor to enforce her executes another deed to a third person, the second grantee claim for support. *Helms v. Helms*, 164.

The rendition of a judgment by default final at the return term in an action to cancel a deed, is an irregularity for which it should be set aside. *Junge v. MacKnight*, 105.

The evidence of a statement by a grantor to a grantee at the time of the delivery of a deed that it should be void if the grantee did not support the grantor, is not sufficient evidence to show that this condition was omitted from the deed by mistake. *Helms v. Helms*, 164.

In an action to cancel a deed for the fraud of the grantee, the grantor in this case is entitled to such damages as the grantee might have done to the land. *Gillis v. Arringdale*, 295.

A declaration, by a grantee in a deed duly recorded, to the effect that he does not claim any interest in the land conveyed, does not operate as an estoppel *in pais* in favor of a subsequent grantee from the same grantor, having actual notice of the prior deed. *Helms v. Helms*, 164.

The rendition of a judgment by default final at the return term

DEEDS—*Continued.*

in an action to cancel a deed, is an irregularity for which it should be set aside. *Junge v. MacKnight*, 105.

In an action for the reformation of a deed as to the consideration, the value of the land and what the grantor would have sold it for at the time of the execution of the deed is competent in corroboration of the evidence of the grantor as to the consideration. *Gillis v. Arringdale*, 291.

DEMURRER. See "Pleadings."

DESCENT AND DISTRIBUTION.

Where one is survived by his daughter and widow, and the daughter inherits an estate from him and dies before the widow, the heirs of the widow, and not those of the husband, inherit the estate, and it is immaterial whether the daughter or widow were in possession. *Weeks v. Quinn*, 425.

An executor whose wife is the residuary legatee under the will of the testator is not entitled to credits for sums paid for taxes on his wife's land or for money paid to defray his wife's expenses on a trip. *Bean v. Bean*, 92.

DISMISSAL. See "Nonsuit."

Where two causes of action are improperly joined, but one of them because of the amount involved is not within the jurisdiction of the court, it is admissible as to the one over which the court has no jurisdiction. *Railroad Co. v. Hardware Co.*, 73.

No appeal lies from a refusal to dismiss an action, but an exception should be taken and the trial proceeded with. *Johnson v. Reformers*, 385.

DOCUMENTARY EVIDENCE. See "Evidence."

Plats and certificates of a survey, not being identified or explained, are not competent evidence to show the location of land. *Cowles v. Lovin*, 488.

A letter by a third person giving the substance of a conversation with the defendant is not competent evidence as against the defendant. *Trust Co. v. Benbow*, 303.

The fact that a letter was dictated by one member of a firm and the firm name signed by the other member of the firm does not sufficiently identify it to make it admissible in evidence. *Trust Co. v. Benbow*, 303.

Where a plaintiff introduced in evidence the entire record in supplementary proceedings, it thereby waived its exception to the

DOCUMENTARY EVIDENCE—*Continued.*

previous exclusion of parts of such record objected to as being fragmentary. *Trust Co. v. Benbow*, 303.

DOWER.

The release of a dower by a wife is a valuable consideraton for a note executed by her husband to her. *Trust Co. v. Benbow*, 303.

DUE PROCESS OF LAW.

An act providing that the owner of swamp lands failing to pay certain taxes shall forfeit the land to the state board of education is not constitutional. *Lumber Co. v. Lumber Co.*, 742.

E

EASEMENTS.

An alley is not necessarily a street and the public have not necessarily a right to its use. *Milliken v. Denny*, 19.

The complaint in this action to restrain the closing of an alley is not sufficient to show an easement in the plaintiff, the adjoining land owner, entitling him to enjoin the obstruction thereof. *Milliken v. Denny*, 19.

EJECTMENT. See "Quieting Title."

The compensation received by a surveyor of land involved in ejectment is not such a disqualifying interest as to render proof of a declaration by the surveyor as to the boundary incompetent. *Westfeldt v. Adams*, 581.

It is not competent in an action of ejectment for a witness to state that his father pointed toward the land in question and said the reason he did not enter it was that it was covered by other grants, this being hearsay evidence. *Westfeldt v. Adams*, 591.

Plats and certificates of a survey, not being identified or explained, are not competent evidence to show the location of land. *Cowles v. Lovin*, 488.

ELECTRIC COMPANY.

Where the charter of a city provides that bonds for electric lights may be issued when submitted to and approved by the voters, the city cannot issue such bonds without such vote. *Robinson v. Goldsboro*, 382.

The providing of a system for lighting the streets of a town is a necessary expense, for which bonds may be issued without submitting the proposition to a vote of the people. *Davis v. Fremont*, 538.

EMINENT DOMAIN.

A railroad company may make a change in a county road that does not necessarily impair its usefulness. *Brinkley v. Railroad Co.*, 654.

ESTOPPEL.

The failure of plaintiff to recover fees and salary in the action adjudging his right to an office is a bar to a new and independent action for fees and salary. *McCall v. Webb*, 356.

In an action to recover damages for injuries by ponding water on land, the judgment set out in this case does not estop the plaintiffs from recovering permanent damages. *Candler v. Electric Co.*, 12.

An account filed by an executor is only *prima facie* correct, and he is not estopped to impeach it. *Bean v. Bean*, 92.

Where one tenant in common obtains judgment against a co-tenant for the cancellation of a deed, the co-tenant is not estopped to claim title under the deed as against other co-tenants not parties. *Allred v. Smith*, 443.

EVIDENCE. See "Corroborative Evidence"; "Declarations"; "Documentary Evidence"; "Hearsay Evidence."

Where a guardian's answer in a suit for an accounting contained an admission that he had used the funds of his ward in his own business and for his own benefit, the introduction of evidence of an admission to the same effect, made by the guardian in a proceeding instituted for his removal, was harmless error. *Fisher v. Brown*, 198.

If a principal receives goods purchased by an agent and appropriates them to his use, he is liable therefor, unless he can show that he furnished his agent with the necessary funds, but that the agent bought on credit, of which fact the principal had no notice. *Brittain v. Westhall*, 492.

In this action to recover a balance due for lumber, the evidence is sufficient to be submitted to the jury on the question whether the buyer was the agent of the defendant. *Brittain v. Westhall*, 492.

In an action for injuries caused by the falling of an elevator, the falling thereof without some apparent cause is evidence of negligence in its original construction. *Womble v. Grocery Co.*, 474.

In an action for damages by a dam across a stream, it is competent to show the condition of the banks of the stream above

EVIDENCE—*Continued.*

and below the dam in order to show that this condition was not caused by the erection of the dam. *Chaffin v. Mfg. Co.*, 96.

The rule of the supreme court relieving the trial judge of the duty of instructing specially upon the nature of corroborative or impeaching evidence, unless specially requested, does not apply to a case where the trial judge in his charge marshals impeaching evidence along with substantive evidence without calling attention thereto. *Westfeldt v. Adams*, 581.

In this action to recover for injuries from unboxed cog-wheels the trial judge properly refused to nonsuit the plaintiff. *Creech v. Cotton Mills*, 680.

A request to charge that the "plaintiff cannot recover" should not be given. *Foy v. Winston*, 439.

In this action for injuries received from a sand-dryer the trial judge properly instructed the jury that there was no evidence of contributory negligence. *Walker v. Railroad Co.*, 738.

In an action for injuries caused by the falling of an elevator, a failure to inspect the same for eighteen months is evidence of negligence. *Womble v. Grocery Co.*, 474.

The admission of incompetent evidence, which is subsequently excluded, is harmless error. *Cowles v. Lovin*, 488.

In an action for damages caused by a dam across a stream, it is not competent to show the effect of the increased benefit of the waters on the lands of adjoining owners. *Chaffin v. Mfg. Co.*, 95.

In an action by a vendee for specific performance, evidence of the defendant vendor as to who was living on land claimed by a prior purchaser from him under an oral contract at the time of the execution of plaintiff's contract is admissible on the issue raised by defendant of a mutual mistake in the latter contract in including such land. *Kelly v. Johnson*, 650.

The burden of proving that a statute was not passed in accordance with the constitution is on the person alleging its invalidity. *Comrs. v. Packing Co.*, 62.

The journals of the general assembly are conclusive evidence as to the passage of an act and cannot be contradicted by entries made on an original bill. *Comrs. v. Packing Co.*, 62.

In an action on a promissory note, a receipt from the payee to the payor, not referring to any particular debt, is some evidence of payment, there being no evidence of any other indebtedness between the parties. *Guano Co. v. Marks*, 59.

EVIDENCE—*Continued.*

In an action on a policy of insurance it is competent to show that the policy was procured by fraudulent statements as to the health of the insured; that the premiums were not paid by the insured; that the party paying the premiums and for whose benefit the policy was issued had no insurable interest in the insured, and that the assignment of the policy was made without the knowledge or consent of the insurer. *Hinton v. Ins. Co.*, 314.

In an action for injuries to a servant whose hand was caught in open cog-wheels, testimony that the cog-wheels should have been covered was incompetent. *Marks v. Cotton Mills*, 287.

In an action for injuries to a servant whose hand was caught in open cog-wheels, evidence that he had seen one machine with such cogs boxed in is not competent. *Marks v. Cotton Mills*, 287.

The evidence of a statement by a grantor to a grantee at the time of the delivery of a deed that it should be void if the grantee did not support the grantor, is not sufficient evidence to show that this condition was omitted from the deed by mistake. *Helms v. Helms*, 164.

The erroneous exclusion of evidence is not reversible error when such evidence is afterwards admitted. *Kelly v. Johnson*, 650.

The withdrawal by mutual consent of a deposit by a person, the same being for the performance of a contract, is not conclusive evidence that the agreement of forfeiture should no longer be a part of the contract. *Eekhout v. Cole*, 583.

In this action for injuries received from a sand-dryer there is evidence sufficient to go to the jury as to the negligence of the defendant, and that this negligence was the proximate cause of the injury. *Walker v. Railroad Co.*, 738.

Evidence that a policy of insurance was not purchased for the benefit of the insured, and that the insured did not pay the premiums, is not incompetent as tending to vary the terms of a written contract. *Hinton v. Ins. Co.*, 315.

In this action to recover damages for the death of the intestate, the evidence of neligence by the railroad is sufficient to be submitted to the jury. *Carter v. Railroad Co.*, 498.

In this action to cancel a mortgage for fraud, the evidence is sufficient to be submitted to the jury. *Hill v. Gettys*, 373.

EXAMINATION OF WITNESSES. See "Witnesses."

Where an objection to a question was overruled, and before an answer was given the attorney told the witness to stand aside,

EXAMINATION OF WITNESSES—*Continued.*

it was not error for the court to repeat the question and require the witness to answer it. *Eekhout v. Cole,* 583.

EXCEPTIONS AND OBJECTIONS.

Where an objection to a question was overruled, and before an answer was given the attorney told the witness to stand aside, it was not error for the court to repeat the question and require the witness to answer it. *Eekhout v. Cole,* 583.

An exception that the court erred in its charge to the jury is too broad to be considered on appeal. *Sigman v. Railroad,* 181.

The exceptions in a case on appeal must be briefly and clearly stated and numbered. *Sigman v. Railroad,* 181.

Where hearsay evidence is admitted without objection and considered by the jury, an objection thereto will not be considered on appeal. *Holder v. Mfg. Co.,* 392.

The mere omission to charge on a particular point is not ground for exception after verdict, unless the court was requested in apt time to give the instruction. *Cowles v. Lovin,* 488.

Even though an exception to the denial of a motion for a new trial be construed as an exception to the charge, it cannot be reviewed, since it is a "broadside exception." *Kelly v. Johnson,* 650.

Where an instruction is erroneous, and is duly excepted to, the party excepting may avail himself of the error, though he asked no special instruction on the subject. *Chaffin v. Mfg. Co.,* 95.

The language of an instruction exactly corresponding with the words of an issue submitted, to which no exception was taken, is not open to the criticism that it is misleading. *Chaffin v. Mfg. Co.,* 95.

Where a plaintiff introduced in evidence the entire record in supplementary proceedings, it thereby waived its exception to the previous exclusion of parts of such record objected to as being fragmentary. *Trust Co. v. Benbow,* 303.

EXECUTORS AND ADMINISTRATORS. See "Legacies and Devises."

An account filed by an executor is only *prima facie* correct, and he is not estopped to impeach it. *Bean v. Bean,* 92.

In an action to foreclose a mortgage, in which a sale under a prior judgment is asked, the personal representative and heirs of the judgment debtor should be made parties. *Fidelity Asso. v. Lash,* 405.

EXECUTORS AND ADMINISTRATORS—*Continued.*

An executor whose wife is the residuary legatee under the will of the testator is not entitled to credits for sums paid for taxes on his wife's land or for money paid to defray his wife's expenses on a trip. *Bean v. Bean*, 92.

Where the assignee of an insurance policy could not recover on account of having no insurable interest in the insured, for whom he had paid the premiums, he cannot, as the administrator of the insured, recover the amount of the policy for the purpose of carrying out the original agreement that the insurance was to be for his benefit. *Hinton v. Ins. Co.*, 314.

The withdrawal by mutual consent of a deposit by a person, the same being for the performance of a contract, is not conclusive evidence that the agreement of forfeiture should no longer be a part of the contract. *Eckhout v. Cole*, 583.

A deposit by a person under a previous contract, the same being for the performance of the contract and withdrawn by mutual consent and loaned to the other party to the contract, is a valid claim against the estate of the lendee. *Eckhout v. Cole*, 583.

Where one is survived by his daughter and widow, and the daughter inherits an estate from him and dies before the widow, the heirs of the widow, and not those of the husband, inherit the estate, and it is immaterial whether the daughter or widow were in possession. *Weeks v. Quinn*, 425.

F

FEDERAL COURTS.

The petition in this case for removal to the federal court on account of diversity of citizenship and the jurisdictional amount does not sufficiently allege the amount involved. *Comrs. v. Railroad Co.*, 81.

FELLOW-SERVANT.

The fellow-servant law applies to all railroad employees, whether injured while running trains or rendering any other service. *Sigmon v. Railroad*, 101.

FINDINGS OF COURT.

A finding of facts by the trial judge by consent of parties is conclusive on appeal where there is evidence to sustain the same. *Comrs. v. Packing Co.*, 62.

FORECLOSURE OF MORTGAGES. See "Mortgages."

In a foreclosure proceeding, in which all persons having an interest in the property were made parties, it was proper to move for a decree of sale under a judgment lien under which the property might have been sold without such decree. *Fidelity Asso. v. Lash*, 405.

FOREIGN CORPORATIONS. See "Corporations."

FORFEITURES.

An act providing that the owner of swamp lands failing to pay certain taxes shall forfeit the land to the state board of education is not constitutional. *Lumber Co. v. Lumber Co.*, 742.

FORMER ADJUDICATION.

The supreme court, on a second appeal, is not precluded under the doctrine of the law of the case from passing on a question not determined on the first appeal. *Vann v. Edwards*, 661.

FRAUD.

In an action on a policy of insurance it is competent to show that the policy was procured by fraudulent statements as to the health of the insured; that the premiums were not paid by the insured; that the party paying the premiums and for whose benefit the policy was issued had no insurable interest in the insured, and that the assignment of the policy was made without the knowledge or consent of the insurer. *Hinton v. Ins. Co.*, 314.

In proceedings to probate a will, an instruction that if the devisees "influenced" the testator the finding should be for the caveators, is not ground for a new trial, in view of the entire charge of the court herein. *Westbrook v. Wilson*, 400.

In this action to cancel a mortgage for fraud, the evidence is sufficient to be submitted to the jury. *Hill v. Gettys*, 373.

In a suit by a vendee for specific performance, defended on the ground that certain land was included in the contract by mistake, an issue tendered by defendant which omits to direct inquiry to the mutuality of the mistake is properly rejected. *Kelly v. Johnson*, 650.

FRAUDULENT CONVEYANCES.

Where the consideration for a note transferred by a husband to his wife was adequate, was a question of fact for the jury and could not be considered on appeal. *Trust Co. v. Benbow*, 304.

G

GAMING.

Where a person buys cotton "futures" for another and suffers loss, he cannot maintain an action for reimbursement. *Garseed v. Sternberger*, 501.

The Code, sec. 1115, requiring a witness to testify touching any unlawful gaming done by himself or others, is not unconstitutional by reason of the fifth amendment to the constitution of the United States or Art. I, sec. 11, of the constitution of North Carolina, for the reason that the said statute grants a pardon to the witness. *In re Briggs*, 118.

GENERAL ASSEMBLY. See "Acts"; "Statutes"; "The Code."

The general assembly may abolish remedies and substitute new ones, or even without substituting any, if a reasonable remedy still remains. *McCall v. Webb*, 356.

The journals of the general assembly are conclusive evidence as to the passage of an act and cannot be contradicted by entries made on an original bill. *Comrs. v. Packing Co.*, 62.

GUARDIAN AND WARD.

Where a guardian uses the funds of his ward in his own business, he is chargeable with the highest rate of interest allowed by law. *Fisher v. Brown*, 198.

Where a guardian uses funds of his ward, but makes regular annual settlements, charging himself with interest thereon, he is entitled to his commissions. *Fisher v. Brown*, 198.

An action by the ward against the sureties on the bond of the guardian is barred after three years from the time the ward becomes twenty-one years old if the guardian makes no final settlement, and within six years if the guardian makes a final settlement. *Self v. Shugart*, 181.

Where a guardian's answer in a suit for an accounting contained an admission that he had used the funds of his ward in his own business and for his own benefit, the introduction of evidence of an admission to the same effect, made by the guardian in a proceeding instituted for his removal, was harmless error. *Fisher v. Brown*, 198.

H

HARMLESS ERROR.

Where a guardian's answer in a suit for an accounting contained an admission that he had used the funds of his ward in his own business and for his own benefit, the introduction of evidence of an admission to the same effect, made by the guardian

HARMLESS ERROR—*Continued.*

in a proceeding instituted for his removal, was harmless error. *Fisher v. Brown,* 198.

The admission of incompetent evidence, which is subsequently excluded, is harmless error. *Cowles v. Lovin,* 488.

The erroneous exclusion of evidence is not reversible error when such evidence is afterwards admitted. *Kelly v. Johnson,* 650.

HAWKERS. See "Peddlers."

HEARSAY EVIDENCE. See "Evidence."

Where hearsay evidence is admitted without objection and considered by the jury, an objection thereto will not be considered on appeal. *Holder v. Mfg. Co.,* 392.

It is not competent in an action of ejectment for a witness to state that his father pointed toward the land in question and said the reason he did not enter it was that it was covered by other grants, this being hearsay evidence. *Westfeldt v. Adams,* 581.

HIGHWAYS.

A railroad company has a right to change the grade of its roadbed or to remove it to any point on its right-of-way. *Brinkley v. Railroad Co.,* 654.

A railroad company may make a change in a county road that does not necessarily impair its usefulness. *Brinkley v. Railroad Co.,* 654.

HOMESTEAD.

In this action for the foreclosure of a mortgage the homestead should have been sold subject to the lien of a prior judgment. *Fidelity Asso. v. Lash,* 405.

At a sale under a mortgage covering the judgment debtor's undivided interest in a part of the land afterward allotted to him, the purchaser took the property subject to the lien of the judgments. *Fidelity Asso. v. Lash,* 405.

HUSBAND AND WIFE. See "Married Women."

A married woman may dispose of her property by gift or otherwise without the assent of her husband, unless the law requires the disposition of it to be evidenced by a conveyance or a writing. *Vann v. Edwards,* 661.

Whether the consideration for a note transferred by a husband to his wife was adequate, was a question of fact for the jury and could not be considered on appeal. *Trust Co. v. Benbow,* 303.

HUSBAND AND WIFE—*Continued.*

The release of a dower by a wife is a valuable consideration for a note executed by her husband to her. *Trust Co. v. Benbow*, 303.

An executor whose wife is the residuary legatee under the will of the testator is not entitled to credits for sums paid for taxes on his wife's land or for money paid to defray his wife's expenses on a trip. *Bean v. Bean*, 92.

I

IMPEACHMENT OF WITNESSES. See "Witnesses."

The rule of the supreme court relieving the trial judge of the duty of instructing specially upon the nature of corroborative or impeaching evidence, unless specially requested, does not apply to a case where the trial judge in his charge marshals impeaching evidence along with substantive evidence without calling attention thereto. *Westfeldt v. Adams*, 591.

IMPROVEMENTS.

One who occupies land under a parol contract of purchase and who has made valuable improvements thereon, is entitled, on interpleading in a suit by a subsequent purchaser for specific performance, to the value of his improvements, to be deducted from the balance of the purchase-money due from plaintiff, who, under his contract, is entitled to a deed with full covenants of warranty. *Kelly v. Johnson*, 647.

In an action for the cancellation of a deed, the grantee is entitled to reduce the damage to the land by the enhanced value of the same from improvements placed theron. *Gillis v. Arringdale*, 295.

INJUNCTION.

A complaint by a board of county commissioners to enjoin the treasurer from paying interest on county bonds sought to be invalidated, which fails to allege that he has any funds applicable to such purpose, or that he threatens or purposes to pay any public funds on the bonds or interest, is fatally defective. *Comrs. v. Williams*, 660.

An injunction will not issue where the title to personal property is the sole question involved, there being adequate remdies at law. *Kistler v. Weaver*, 388.

An injunction will not lie to prevent the removal of timber in the absence of an allegation of insolvency of the defendant. *Kistler v. Weaver*, 388.

INJUNCTION—*Continued.*

Acts 1903, ch. 251, provides a plain and adequate remedy at law to test the validity and regularity of a tax assessment, and it cannot be tested by an injunction. *Wilson v. Green*, 343.

One suffering peculiar injury from a public nuisance is not restricted to an action for damages, but may sue for an injunction. *Reyburn v. Sawyer*, 328.

The insolvency of defendant, so that a recovery would be of no avail, and the injury irreparable, furnishes ground for an injunction to abate a nuisance erected by defendant. *Reyburn v. Sawyer*, 328.

The facts in this case entitle the plaintiff to an injunction restraining the defendant from maintaining fish nets in the channel near the property of the plaintiff. *Reyburn v. Sawyer*, 328.

Before an order allowing a person to cut timber can be made in an action to quiet title, the court must find as a fact and incorporate it in the order that the party allowed to cut the timber claims the land in good faith and has a *prima facie* title thereto, and that the claim of the adverse party is not made in good faith. *Johnson v. Duvall*, 642.

INSOLVENCY.

An injunction will not lie to prevent the removal of timber in the absence of an allegation of insolvency of the defendant. *Kistler v. Weaver*, 388.

The insolvency of defendant, so that a recovery would be of no avail, and the injury irreparable, furnishes ground for an injunction to abate a nuisance erected by defendant. *Reyburn v. Sawyer*, 328.

INSTRUCTIONS.

While an instruction to the jury in a personal injury case to answer the issue of contributory negligence "no" is bad in form, yet it is not ground for reversal, where there is in fact an entire absence of evidence of contributory negligence. *Walker v. Railroad Co.*, 738.

The mere omission to charge on a particular point is not ground for exception after verdict, unless the court was requested in apt time to give the instruction. *Cowles v. Lovin*, 488.

A request to charge that the "plaintiff cannot recover" should not be given. *Foy v. Winston*, 439.

A contention that the court erred in giving undue prominence to the testimony of one particular witness was without merit.

INSTRUCTIONS—*Continued.*

where his name was mentioned in the charge but once, and that on an issue which was answered as a proposition of law under an instruction of the court. *Lance v. Butler*, 420.

Even though an exception to the denial of a motion for a new trial be construed as an exception to the charge, it cannot be reviewed, since it is a "broadside exception." *Kelly v. Johnson*, 650.

In an action for damages caused by a dam across a stream, an instruction that the party alleging damages must prove the same to the satisfaction of the jury, where the trial judge charged that the burden was on him and defined a preponderance of evidence, is not objectionable. *Chaffin v. Mfg. Co.*, 95.

The language of an instruction exactly corresponding with the words of an issue submitted, to which no exception was taken, is not open to the criticism that it is misleading. *Chaffin v. Mfg. Co.*, 95.

The trial judge need not give instructions in the very language employed in framing them if they are substantially given in the charge. *Chaffin v. Mfg. Co.*, 95.

An exception that the court erred in its charge to the jury is too broad to be considered on appeal. *Cowles v. Lovin*, 488.

Where the case on appeal states that an instruction was not given as set forth in an exception, it will not be considered. *Cowles v. Lovin*, 488.

INSURANCE.

Evidence that a policy of insurance was not purchased for the benefit of the insured, and that the insured did not pay the premiums, is not incompetent as tending to vary the terms of a written contract. *Hinton v. Ins. Co.*, 314.

Where it was agreed at the time application for a life policy was made that a person having no insurable interest in the life of the insured should pay all the premiums and receive the proceeds of the policy, it was void. *Hinton v. Ins. Co.*, 314.

Service of process on the state insurance commissioner is valid although the insurance company has not domesticated. *Hinton v. Ins. Co.*, 314.

A mutual order for insurance cannot change its constitution subsequent to the contract with one of its members and to his detriment except by mutual consent. *Johnson v. Reformers*, 385.

Where the assignee of an insurance policy could not recover on account of having no insurable interest in the insured, for

INSURANCE—*Continued.*

whom he had paid the premiums, he cannot, as the administrator of the insured, recover the amount of the policy for the purpose of carrying out the original agreement that the insurance was to be for his benefit. *Hinton v. Ins. Co.*, 314.

In an action on a policy of insurance it is competent to show that the policy was procured by fraudulent statements as to the health of the insured; that the premiums were not paid by the insured; that the party paying the premiums and for whose benefit the policy was issued had no insurable interest in the insured, and that the assignment of the policy was made without the knowledge or consent of the insurer. *Hinton v. Ins. Co.*, 314.

INTEREST.

Where a guardian uses the funds of his ward in his own business, he is chargeable with the highest rate of interest allowed by law. *Fisher v. Brown*, 198.

In an action for damages for conversion the jury may allow interest on the amount of the damages from the time of the conversion. *Lance v. Butler*, 419.

In an action for damages for conversion, the verdict being the value of the property at the time of the conversion, interest can only begin from the time of the judgment. *Lance v. Butler*, 419.

In an action for breach of warranty on the sale of an engine for use in a saw-mill plaintiff is entitled to interest on the amount invested in the mill for the time it was idle. *Critcher v. Porter Co.*, 542.

INTERSTATE COMMERCE.

Where a car of lumber tendered to a railroad company for transportation was found to have been properly loaded, the carrier was liable for the penalty for refusal to receive the same for transportation, notwithstanding the car was to be shipped out of the state. *Currie v. Railroad Co.*, 535.

INTOXICATING LIQUORS.

A *mandamus* will not lie to control the discretion given the county commissioners in issuing liquor license under acts 1903, ch. 233. *Bridges v. Comrs.*, 25.

Under acts 1903, ch. 233, a *mandamus* will not lie to control the discretion of the county commissioners in the matter of granting liquor licenses. *Barnes v. Comrs.*, 27.

ISSUES. See "Instructions."

The refusal to submit issues, the answer to which would not affect the result, is not error. *Helms v. Helms*, 164.

Where one not the owner of goods gave a mortgage thereon, and the true owner sued the mortgagee in conversion, a request for an issue as to whether plaintiff was damaged by the sale, and, if so, how much, was proper. *Lance v. Butler*, 419.

In an action for injuries to a servant, contributory negligence is an affirmative defense, and any issue thereon must be tendered by defendant in order to be available. *Womble v. Grocery Co.*, 474.

The proper second issue in an action for damages on the question of mental anguish is: "What damage, if any, has the plaintiff sustained on account of mental anguish caused by such negligence?" *Hunter v. Telegraph Co.*, 458.

In this suit for the cancellation of a conveyance and for damages, an issue as to what consideration defendant agreed to pay for the land was properly submitted. *Gillis v. Arringdale*, 295.

While an instruction to the jury in a personal injury case to answer the issue of contributory negligence "no" is bad in form, yet it is not ground for reversal, where there is in fact an entire absence of evidence of contributory negligence. *Walker v. Railroad Co.*, 738.

In an action for trespass on lands counsel agreed that if the jury should answer the first issue as to title "yes" then it was admitted that defendant had trespassed and that the amount of damages should be ascertained under The Code. The first issue was whether plaintiff was the owner of the lands described in the complaint or any part thereof. The second was, "If so, what part?" It was not error to submit a third issue as to whether defendant had trespassed on lands described in the complaint, and which were inside a certain grant to plaintiff, where it appeared to the court that the evidence raised a question as to whether defendant might not have trespassed on lands described in the complaint, but which it might be found were not within the grant and did not belong to plaintiff. *Lumber Co. v. Lumber Co.*, 744.

J

JUDGMENTS.

In this action for the foreclosure of a mortgage the homestead should have been sold subject to the lien of a prior judgment. *Fidelity Asso. v. Lash*, 405.

JUDGMENTS—*Continued.*

At a sale under a mortgage covering the judgment debtor's undivided interest in a part of the land afterward allotted to him, the purchaser took the property subject to the lien of the judgments. *Fidelity Asso. v. Lash*, 405.

In a foreclosure proceeding, in which all persons having an interest in the property were made parties, it was proper to move for a decree of sale under a judgment lien under which the property might have been sold without such decree. *Fidelity Asso. v. Lash*, 405.

Parties claiming rights in property by virtue of a judgment should set up the entire record in the suit in which the judgment was rendered. *Allred v. Smith*, 443.

Where one tenant in common obtains judgment against a co-tenant for the cancellation of a deed, the co-tenant is not estopped to claim title under the deed as against other co-tenants not parties. *Allred v. Smith*, 443.

Where one tenant in common obtains judgment against a co-tenant for the cancellation of a deed, the co-tenant is not estopped to claim title under the deed as against the other co-tenants not parties. *Allred v. Smith*, 443.

In an action for damages for conversion, the verdict being the value of the property at the time of the conversion, interest can only begin from the time of the judgment. *Lance v. Butler*, 419.

Where, in an action for trespass on lands, the jury found that plaintiff owned a portion of the lands described in the complaint, but that the defendant had not trespassed on that portion, it was error to include in the judgment a decision that the title to such portion was in plaintiff. *Lumber Co. v. Lumber Co.*, 742.

In an action to recover damages for injuries by ponding water on land, the judgment set out in this case does not estop the plaintiffs from recovering permanent damages. *Candler v. Electric Co.*, 12.

Where a nonsuit is granted upon a demurrer to the evidence, a new action may be brought within one year. *Hood v. Telegraph Co.*, 622.

JURISDICTION.

An action against a surety on an attachment bond in the penal sum of $200, being *ex contractu*, must be brought before a justice of the peace. *Railroad Co. v. Hardware Co.*, 73.

A foreign corporation may be sued in this state though it has not been domesticated. *Johnson v. Reformers*, 385.

JURISDICTION—*Continued.*

Where a defendant asks for a *recordari*, he thereby waives a lack of service of summons. *Johnson v. Reformers*, 385.

Where a summons is improperly made returnable before the judge at chambers, he should not dismiss the action, but transfer it to the civil issue docket. *Martin v. Clark*, 178.

L

"LAST CLEAR CHANCE." See "Contributory Negligence"; "Negligence."

Where the evidence tends to show that the intestate was helpless on the railroad track and could have been seen in time to stop the train, the plaintiff may recover for the death of the intestate on the ground of the "last clear chance." *Carter v. Railroad Co.*, 498.

LEGACIES AND DEVISES. See "Wills."

Where a testator devised his lands south of a certain line, "containing by estimation two hundred acres," and subsequently he purchased other lands south of the line, the reference to the number of acres did not prevent the latter lands being included in the devise. *Brown v. Hamilton*, 10.

LEGISLATURE. See "General Assembly"; "Acts"; "The Code"; "Statutes."

LIBEL.

A publication by a newspaper that a director of the state's prison is guilty of a gross breach of official duty and the receipt of money illegally is libelous *per se*, and the burden is on the defendant to prove the truth thereof or matter in mitigation. *Osborn v. Leach*, 628.

Actual damages include pecuniary loss, physical pain, mental suffering, and injury to reputation. *Osborn v. Leach*, 628.

In an action for libel, where the newspaper publishes a retraction, no notice as required by acts 1901, ch. 557, need have been given. *Osborn v. Leach*, 628.

In an action for libel against a newspaper the failure to give notice of the action as required only relieves the paper of punitive damages. *Osborn v. Leach*, 628.

An act taking away from a person the right to recover punitive damages in case of libel is constitutional. *Osborn v. Leach*, 628.

In an action against a newspaper for libel the failure of the complaint to allege the five days' notice renders it demurrable. *Osborn v. Leach*, 628.

LIBEL—*Continued.*

Where a statute for libel applies equally to all newspapers and periodicals, it does not amount to an unconstitutional discrimination.' *Osborn v. Leach,* 628.

In an action for libel against a newspaper, the paper having pleaded a retraction of the publication, it is necessary for the defendant to show that the publication was made in good faith, and with reasonable ground to believe it to be true, in order to relieve the paper from punitive damages. *Osborn v. Leach,* 628.

Where a demurrer was sustained to a complaint for libel against a newspaper because it failed to appear that notice of the action had been given, the trial court may permit an amendment showing that fact. *Osborn v. Leach,* 628.

LICENSES.

Under the charter of the city of Winston, dealers in trading stamps do not come within the provision of an ordinance taxing "gift enterprises." *Winston v. Beeson,* 271; *Winston v. Hudson,* 286.

A *mandamus* will not lie to control the discretion given the county commissioners in issuing liquor license under acts 1903, ch. 233. *Bridges v. Comrs.,* 25.

An ordinance requiring a license of livery-men, and providing that it shall include any persons making contract for hire in town, "or carry any person with a vehicle out of the town for hire," is not only void as being unreasonable, but is unlawful as well. *Plymouth v. Cooper,* 1.

Where ranges are manufactured in one state and sold by sample in another, neither the person exhibiting the sample nor those making delivery thereof in the original packages are peddlers. *Range Co. v. Campen,* 506.

Under acts 1903, ch. 233, a *mandamus* will not lie to control the discretion of the county commissioners in the matter of granting liquor licenses. *Barnes v. Comrs.,* 76; *Howell v. Comrs.,* 26.

The license tax imposed on every itinerant person peddling ranges is a violation of the constitution of the United States to the extent of sales by sample of goods manufactured in another state, shipped into this state and delivered in their original packages. *Range Co. v. Campen,* 506.

LIMITATIONS OF ACTIONS.

An action to set aside a tax deed as a cloud on title is not barred within three years from the sale. *Beck v. Meroney,* 532.

Where a nonsuit is granted upon a demurrer to the evidence, a new

LIMITATIONS OF ACTIONS—*Continued.*

action may be brought within one year. *Hood v. Telegraph Co.*, 622.

An action by the ward against the sureties on the bond of the guardian is barred after three years from the time the ward becomes twenty-one years old if the guardian makes no final settlement; and within six years if the guardian makes a final settlement. *Self v. Shugart*, 185.

LIVERY STABLES.

An ordinance requiring a license of livery-men, and providing that it shall include any persons making contract for hire in town, "or carry any person with a vehicle out of the town for hire," is not only void as being unreasonable, but is unlawful as well. *Plymouth v. Cooper*, 1.

LOTTERIES.

Under the charter of the city of Winston, dealers in trading stamps do not come within the provision of an ordinance taxing "gift enterprises." *Winston v. Beeson*, 271; *Winston v. Hudson*, 286.

M

MALICE.

In an action for damages for causing the discharge of an employee, actual malice need not be shown, it being sufficient if the act is done without legal excuse. *Holder v. Mfg. Co.*, 392.

MANDAMUS.

An act "authorizing and empowering" county commissioners to issue bonds is not mandatory. *Jones v. Comrs.*, 219; *Bank v. Comrs.*, 230.

A *mandamus* is the proper remedy to compel county commissioners to issue bonds ordered by the general assembly. *Jones v. Comrs.*, 218; *Bank v. Comrs.*, 238.

A *mandamus* will lie to compel a county treasurer to pay a warrant out of a specific fund, the warrant having been drawn by the county commissioners. *Martin v. Clark*, 178.

The motion of the plaintiff in *mandamus* proceedings, on the pleadings and admissions of defendant, for a *mandamus*, is in the nature of a demurrer *ore tenus* to the answer, involving the admission of the facts set out therein. *Barnes v. Comrs.*, 27.

A *mandamus* will not lie to control the discretion given the county commissioners in issuing liquor license under acts 1903, ch. 233. *Bridges v. Comrs.*, 25.

MANDAMUS—*Continued.*

Under acts 1903, ch. 233, a *mandamus* will not lie to control the discretion of the county commissioners in the matter of granting liquor licenses. *Barnes v. Comrs*, 27.

MARRIED WOMEN.

A married woman may dispose of her property by gift or otherwise without the assent of her husband, unless the law requires the disposition of it to be evidenced by a conveyance or a writing. *Vann v. Edwards*, 661.

MASTER AND SERVANT.

In an action for damages for causing plaintiff's discharge by his employer, a charge that, if the same person was assistant manager of defendant and of plaintiff's employer, and of his own motion directed plaintiff's discharge, the jury should find for defendant, was properly modified by inserting before the concluding phrase, "without demand or direction of the defendant." *Holder v. Mfg. Co.*, 392.

MENTAL ANGUISH. See "Telegraphs"; "Libel."

MISTAKE.

In a suit by a vendee for specific performance, defended on the ground that certain land was included in the contract by mistake, an issue tendered by defendant which omits to direct inquiry to the mutuality of the mistake is properly rejected. *Kelly v. Johnson*, 650.

A consignee who entered into a contract for the transfer of cars to his own yard on a switch, and was fully apprised of charges to be made, and paid them, could not recover them as paid under protest, though at the time of making the contract he said that he would pay the charges under protest. *Bernhardt v. Railroad Co.*, 258.

The evidence of a statement by a grantor to a grantee at the time of the delivery of a deed that it should be void if the grantee did not support the grantor, is not sufficient evidence to show that this condition was omitted from the deed by mistake. *Helms v. Helms*, 164.

In an action by a vendee for specific performance, evidence of the defendant vendor as to who was living on land claimed by a prior purchaser from him under an oral contract at the time of the execution of plaintiff's contract is admissible on the issue raised by defendant of a mutual mistake in the latter contract in including such land. *Kelly v. Johnson*, 650.

MORTGAGES. See "Foreclosure of Mortgages."

In this action to cancel a mortgage for fraud, the evidence is sufficient to be submitted to the jury. *Hill v. Gettys*, 373.

A partner has no authority, without the consent of the other partners, to mortgage firm property for his own debt. *Lance v. Butler*, 419.

Where one not the owner of goods gave a mortgage thereon, and the true owner sued the mortgagee in conversion, a request for an issue as to whether plaintiff was damaged by the sale, and, if so, how much, was proper. *Lance v. Butler*, 419.

At a sale under a mortgage covering the judgment debtor's undivided interest in a part of the land afterward allotted to him, the purchaser took the property subject to the lien of the judgments. *Fidelity Asso. v. Lash*, 405.

In this action for the foreclosure of a mortgage the homestead should have been sold subject to the lien of a prior judgment. *Fidelity Asso. v. Lash*, 405.

While a court of equity will not cancel a mortgage for lack of consideration, yet when a jury shall find that it was procured by fraud and fraudulent representations that the mortgagee would pay the consideration, a court of equity will grant the relief. *Hill v. Gettys*, 373.

MUNICIPAL CORPORATIONS.

Under a contract with a water company to supply water for extinguishing fires, requiring that it shall provide pressure on four minutes' notice to throw ten streams at a certain height, a property owner, suing for damages for failure to furnish water for the extinguishment of a fire, need not show that notice was given the company, as such provision was for an extraordinary pressure to show the capacity of the plant. *Joncs v. Water Co.*, 553.

The providing of a system for lighting the streets of a town is a necessary expense, for which bonds may be issued without submitting the proposition to a vote of the people. *Davis v. Fremont*, 538.

Where the charter of a city provides that bonds for electric lights may be issued when submitted to and approved by the voters, the city cannot issue such bonds without such vote. *Robinson v. Goldsboro*, 382.

The presence of a strip of timber nailed lengthwise of the street to electric light poles set in the edge of a sidewalk, maintained for over six years and used for hitching animals, does not

MUNICIPAL CORPORATIONS—*Continued.*

constitute negligence justifying a recovery for injuries to a blind man running against the same. *Foy v. Winston*, 439.

Where a water company contracts with a town to furnish water at a certain pressure for the purpose of extinguishing fires, a citizen injured by a failure of the company to furnish the water as contracted may recover in his own name for the injury. *Jones v. Water Co.*, 553.

N

NEGLIGENCE. See "Assumption of Risk"; "Contributory Negligence"; "Damages"; "Last Clear Chance."

An act done by a teacher in the exercise of his authority, and not prompted by malice, is not actionable, though it may cause permanent injury, unless a person of ordinary prudence could reasonably have foreseen that a permanent injury would naturally or probably result from the act. *Drum v. Miller*, 204.

In this action for personal injuries, the evidence of the negligence of the defendant is sufficient to be submitted to the jury. *Womble v. Grocery Co.*, 474.

A servant employed to operate a freight elevator does not assume the risk of injury owing to a fall of the elevator, in the absence of knowledge of any defect therein, and of any duty to inspect it. *Womble v. Grocery Co.*, 474.

The failure to notify a sender of a telegram of the non-delivery thereof is evidence of negligence. *Cogdell v. Telegraph Co.*, 431.

The misspelling of the name of the sendee of a telegram does not relieve the telegraph company from the burden of showing that it could not have delivered the message with the exercise of reasonable diligence. *Cogdell v. Telegraph Co.*, 431.

Proof or admission that a telegraph company received a message for transmission, and failed to deliver it to the sendee within a reasonable time, makes a *prima facie* case of negligence, and imposes on the company the burden of alleging and proving such facts as it may rely on in excuse. *Cogdell v. Telegraph Co.*, 431.

In an action against a railroad company for wrongfully causing the death of an engineer, the question whether it and another road were partners in operating the part of the road on which the deceased was killed was properly submitted to the jury. *Harrill v. Railroad Co.*, 601.

Where a telegraph company failed to make any attempt to deliver

NEGLIGENCE—*Continued.*

a message because the sendee lived beyond the free delivery limits and also failed to notify the sender of additional charges for such delivery, or of refusal to deliver it at all, the company is liable for damages resulting from its negligence in failing to make the delivery. *Hood v. Telegraph Co.*, 622.

In this action for injuries received from a sand-dryer there is evidence sufficient to go to the jury as to the negligence of the defendant, and that this negligence was the proximate cause of the injury. *Walker v. Railroad Co.*, 738.

In an action by an operative in a mill for personal injuries the plaintiff cannot recover unless she exercises that care which an ordinarily prudent person would or should have exercised. *Creech v. Cotton Mills*, 680.

In this action to recover for injuries from unboxed cog-wheels the trial judge properly refused to nonsuit the plaintiff. *Creech v. Cotton Mills*, 680.

In an action for injuries caused by the falling of an elevator, the falling thereof without some apparent cause is evidence of negligence in its original construction. *Womble v. Grocery Co.*, 474.

In an action for injuries caused by the falling of an elevator, a failure to inspect the same for eighteen months is evidence of negligence. *Womble v. Grocery Co.*, 474.

In an action for injuries to a servant, contributory negligence is an affirmative defense, and any issue thereon must be tendered by defendant in order to be available. *Womble v. Grocery Co.*, 474.

The presence of a strip of timber nailed lengthwise of the street to electric light poles set in the edge of a sidewalk, maintained for over six years and used for hitching animals, does not constitute negligence justifying a recovery for injuries to a blind man running against the same. *Foy v. Winston*, 439.

An editor of a newspaper riding on a pass issued contrary to law may recover for injuries received through the negligence of the carrier, as the duty to carry passengers safely exists independently of contract. *McNeill v. Railroad Co.*, 682.

In an action for injuries to a servant whose hand was caught in open cog-wheels, evidence that he had seen one machine with such cogs boxed in is not competent. *Marks v. Cotton Mills*, 287.

In an action for injuries to a servant whose hand was caught in

NEGLIGENCE—*Continued.*

open cog-wheels, testimony that the cog-wheels should have been covered was incompetent. *Marks v. Cotton Mills*, 287.

In an action against a teacher for injuries to a pupil, caused by the teacher throwing a pencil at the pupil, which permanently injured his eye, an instruction that unless the jury found that a reasonably prudent man might reasonably or in the exercise of ordinary care have expected that the injury complained of would result from his act in throwing the pencil, defendant should be found not liable, was erroneous. *Drum v. Miller*, 204.

A railroad corporation operating a road jointly with another corporation is responsible for injury to its employees, as a natural person would be for the liabilities of a firm of which he is a member. *Harrill v. Railroad Co.*, 601.

NEGOTIABLE INSTRUMENTS.

That the maker of a note does business near the assignee is immaterial on the question as to whether the assignee was a *bona fide* holder. *Setzer v. Deal*, 428.

The knowledge by the *bona fide* assignee of a note of the crookedness in business matters of the assignor does not defeat the title of the assignee or make it his duty to enquire relative to the note. *Setzer v. Deal*, 428.

Where a surviving partner of a firm, who was personally liable on an endorsement of a note in the firm name without authority, organized a corporation and transferred the assets of the firm to such corporation in payment of his subscription to the corporation's stock, without intent to defraud his creditors, the corporation was not liable for such debt. *Bank v. Hollingsworth*, 556.

The giving of a note for a debt is not a payment thereof unless it is so received. *Bank v. Hollingsworth*, 556.

A surviving partner has no power after dissolution to renew or endorse a note not in the name of the firm. *Bank v. Hollingsworth*, 556.

A surviving partner, who, more than two years after dissolution of the firm, endorsed a note in the firm name for the renewal of notes outstanding similarly endorsed, was individually liable on such endorsement, though it did not bind the firm. *Bank v. Hollingsworth*, 556.

In an action on a promissory note, a receipt from the payee to the payor, not referring to any particular debt, is some evidence of payment, there being no evidence of any other indebtedness between the parties. *Guano Co. v. Marks*, 59.

NEGOTIABLE INSTRUMENTS—*Continued.*

Whether the consideration for a note transferred by a husband to his wife was adequate, was a question of fact for the jury and could not be considered on appeal. *Trust Co. v. Benbow*, 303.

Where a party admits the execution of a note, the burden of showing payment is on the payor. *Guano Co. v. Marks*, 59.

The release of a dower by a wife is a valuable consideration for a note executed by her husband to her. *Trust Co. v. Benbow*, 304.

A married woman may dispose of her property by gift or otherwise without the assent of her husband, unless the law requires the disposition of it to be evidenced by a conveyance or a writing. *Vann v. Edwards*, 661.

NEWSPAPERS.

A publication by a newspaper that a director of the state's prison is guilty of a gross breach of official duty and the receipt of money illegally is libelous *per se*, and the burden is on the defendant to prove the truth thereof or matter in mitigation. *Osborn v. Leach*, 628.

In an action for libel against a newspaper the failure to give notice of the action as required only relieves the paper of punitive damages *Osborn v. Leach*, 628.

Actual damages include pecuniary loss, physical pain, mental suffering, and injury to reputation. *Osborn v. Leach*, 628.

Where a statute for libel applies equally to all newspapers and periodicals, it does not amount to an unconstitutional discrimination. *Osborn v. Leach*, 628.

In an action for libel, where the newspaper publishes a retraction no notice as required by acts 1901, ch. 557, need have been given. *Osborn v. Leach*, 628.

NEW TRIAL.

Even though an exception to the denial of a motion for a new trial be construed as an exception to the charge, it cannot be reviewed, since it is a "broadside exception." *Kelly v. Johnson*, 650.

NONSUIT.

In this action to recover for injuries from unboxed cog-wheels the trial judge properly refused to nonsuit the plaintiff. *Creech v. Cotton Mills*, 680.

In this action for personal injuries, the evidence of the negligence of the defendant is sufficient to be submitted to the jury. *Womble v. Grocery Co.*, 474.

NONSUIT—*Continued.*

In this action to recover damages for the death of the intestate, the evidence of negligence by the railroad is sufficient to be submitted to the jury. *Carter v. Railroad Co.*, 498.

Where a nonsuit is granted upon a demurrer to the evidence, a new action may be brought within one year. *Hood v. Telegraph Co.*, 622.

NOTICE.

If a principal receives goods purchased by an agent and appropriates them to his use, he is liable therefor, unless he can show that he furnished his agent with the necessary funds, but that the agent bought on credit, of which fact the principal had no notice. *Brittain v. Westhall*, 492.

Where a dissolution of a firm occurs by operation of law, by the death of one of the partners, the giving of notice of such dissolution is not necessary to prevent liability from attaching to the estate of the deceased partner or of the surviving partners for any future contracts made in the name of the firm. *Bank v. Hollingsworth*, 556.

In an action for libel, where the newspaper publishes a retraction, no notice as required by acts 1901, ch. 557, need have been given. *Osborn v. Leach*, 628.

In an action against a newspaper for libel the failure of the complaint to allege the five days' notice renders it demurrable. *Osborn v. Leach*, 628.

In an action for libel against a newspaper the failure to give notice of the action as required only relieves the paper of punitive damages. *Osborn v. Leach*, 628.

Where a demurrer was sustained to a complaint for libel against a newspaper because it failed to appear that notice of the action had been given, the trial court may permit an amendment showing that fact. *Osborn v. Leach*, 628.

NUISANCE.

The facts in this case entitle the plaintiff to an injunction restraining the defendant from maintaining fish nets in the channel near the property of the plaintiff, *Reyburn v. Sawyer*, 328.

The insolvency of defendant, so that a recovery would be of no avail, and the injury irreparable, furnishes ground for an injunction to abate a nuisance erected by defendant. *Reyburn v. Sawyer*, 328.

One suffering peculiar injury from a public nuisance is not restricted to an action for damages, but may sue for an injunction. *Reyburn v. Sawyer*, 328.

O

OFFICERS.

The failure of plaintiff to recover fees and salary in the action adjudging his right to an office is a bar to a new and independent action for fees and salary. *McCall v. Webb*, 356.

An act allowing the prosecution of an action in the name of the state to assert the right of a citizen to a public office is not for that reason unconstitutional. *McCall v. Webb*, 356.

A publication by a newspaper that a director of the state's prison is guilty of a gross breach of official duty and the receipt of money illegally is libelous *per se*, and the burden is on the defendant to prove the truth thereof or matter in mitigation. *Osborn v. Leach*, 628.

ORDINANCES. See "Municipal Corporations."

An ordinance requiring a license of livery-men, and providing that it shall include any persons making contract for hire in town, "or carry any person with a vehicle out of the town for hire," is not only void as being unreasonable, but is unlawful as well. *Plymouth v. Cooper*, 1.

Under the charter of the city of Winston, dealers in trading stamps do not come within the provision of an ordinance taxing "gift enterprises." *Winston v. Hudson*, 286; *Winston v. Beeson*, 271.

P

PARDONS.

The Code, sec. 1115, requiring a witness to testify touching any unlawful gaming done by himself or others, is not unconstitutional by reason of the fifth amendment to the constitution of the United States or Art. I, sec. 11, of the constitution of North Carolina, for the reason that the said statute grants a pardon to the witness. *In re Briggs*, 118.

PARTIES.

While there is no necessity for joining creditors of a bank as parties plaintiff in a suit brought by the receiver to enforce the stockholders' double liability, such joinder is not prejudicial to the defendant. *Smathers v. Bank*, 410.

Where a water company contracts with a town to furnish water at a certain pressure for the purpose of extinguishing fires, a citizen injured by a failure of the company to furnish the water as contracted may recover in his own name for the injury. *Jones v. Water Co.*, 553.

A receiver for an insolvent bank is the proper party to bring an

PARTIES—*Continued.*

action against the stockholders to enforce their double liability. *Smathers v. Bank*, 410.

It is a misjoinder of parties to bring a suit for damages against a person suing out an attachment and the surety on the attachment bond. *Railroad Co. v. Hardware Co.*, 73.

Where two causes of action are improperly joined, but one of them because of the amount involved is not within the jurisdiction of the court, it is dismissable as to the one over which the court has no jurisdiction. *Railroad Co. v. Hardware Co.*, 73.

An act allowing the prosecution of an action in the name of the state to assert the right of a citizen to a public office is not for that reason unconstitutional. *McCall v. Webb*, 356.

PARTNERSHIP.

A surviving partner has no power after dissolution to renew or endorse a firm note in the name of the firm. *Bank v. Hollingsworth*, 556.

In an action against a railroad company for wrongfully causing the death of an engineer, the question whether it and another road were partners in operating the part of the road on which the deceased was killed was properly submitted to the jury. *Harrill v. Railroad Co.*, 601.

A railroad corporation operating a road jointly with another corporation is responsible for injury to its employees, as a natural person would be for the liabilities of a firm of which he is a member. *Harrill v. Railroad Co.*, 601.

A partner has no authority, without the consent of the other partners, to mortgage firm property for his own debt. *Lance v. Butler*, 419.

An agreement whereby one is to receive part of the profits of an enterprise as a means only of ascertaining his compensation does not create a partnership. *Lance v. Butler*, 419.

The fact that a letter was dictated by one member of a firm and the firm name signed by the other member of the firm does not sufficiently identify it to make it admissible in evidence. *Trust Co. v. Benbow*, 303.

Where a dissolution of a firm occurs by operation of law, by the death of one of the partners, the giving of notice of such dissolution is not necessary to prevent liability from attaching to the estate of the deceased partner or of the surviving partners for any future contracts made in the name of the firm. *Bank v. Hollingsworth*, 556.

PARTNERSHIP—*Continued.*

A surviving partner, who, more than two years after dissolution of the firm, endorsed a note in the firm name for the renewal of notes outstanding similarly endorsed, was individually liable on such endorsement, though it did not bind the firm. *Bank v. Hollingsworth*, 556.

Where a surviving partner of a firm, who was personally liable on an endorsement of a note in the firm name without authority, organized a corporation and transferred the assets of the firm to such corporation in payment of his subscription to the corporation's stock, without intent to defraud his creditors, the corporation was not liable for such debt. *Bank v. Hollingsworth*, 556.

PASSES. See "Carriers"; "Contracts."

PASSENGERS. See "Carriers"; "Railroads."

A person who gets on a blind baggage car, though having a ticket, but not having told the conductor that he had it, and the conductor not having seen it, is not entitled to recover as a passenger for injuries received by being pulled off the train by the conductor. *McGraw v. Railroad Co.*, 264.

PAYMENTS.

Where a tax debtor paid the amount demanded by the sheriff to redeem the land from tax sale, such payment constituted a redemption though the sheriff erroneously computed the amount due. *Beck v. Meroney*, 532.

Where the owner of land pays the sheriff the taxes, costs and interest on land sold for taxes, and the sheriff tenders the money to the purchaser, it is sufficient, though the payment was made to the sheriff by check. *Beck v. Meroney*, 532.

The giving of a note for a debt is not a payment thereof unless it is so received. *Bank v. Hollingsworth*, 556.

Where a party admits the execution of a note, the burden of showing payment is on the payor. *Guano Co. v. Marks*, 59.

In an action on a promissory note, a receipt from the payee to the payor, not referring to any particular debt, is some evidence of payment, there being no evidence of any other indebtedness between the parties. *Guano Co. v. Marks*, 59.

PEDDLERS.

Where ranges are manufactured in one state and sold by sample in another, neither the person exhibiting the sample nor those

PEDDLERS—*Continued.*

making delivery thereof in the original packages are peddlers. *Range Co. v. Campen*, 506.

PENALTIES.

In an action for a penalty, the statute allowing the same being a public one need not be pleaded. *Currie v. Railroad Co.*, 535.

In an action for a penalty, the complaint alleging the tender on a specified day, and that the defendant on the two following days "failed and refused to receive the same," is a sufficient allegation of tender for the last two days. *Currie v. Railroad Co.*, 535.

Where a car of lumber tendered to a railroad company for transportation was found to have been properly loaded, the carrier was liable for the penalty for refusal to receive the same for transportation, notwithstanding the car was to be shipped out of the state. *Currie v. Railroad Co.*, 535.

PERSONAL INJURIES. See "Contributory Negligence"; "Last Clear Chance"; "Negligence"; "Damages."

PERSONAL PROPERTY.

An injunction will not issue where the title to personal property is the sole question involved, there being adequate remedies at law. *Kistler v. Weaver*, 388.

A married woman may dispose of her property by gift or otherwise without the assent of her husband, unless the law requires the disposition of it to be evidenced by a conveyance or a writing. *Vann v. Edwards*, 661.

PLEADINGS.

A complaint by a board of county commissioners to enjoin the treasurer from paying interest on county bonds sought to be invalidated, which fails to allege that he has any funds applicable to such purpose, or that he threatens or purposes to pay any public funds on the bonds or interest, is fatally defective. *Comrs. v. Williams*, 660.

The complaint in this action to restrain the closing of an alley is not sufficient to show an easement in the plaintiff, the adjoining land owner, entitling him to enjoin the obstruction thereof. *Milliken v. Denny*, 19.

In an action to set aside a tax deed as a cloud on title, it was not necessary that the complaint allege that all the taxes had been paid, provided evidence of that fact was introduced at the trial. *Beck v. Meroney*, 532.

PLEADINGS *Continued.*

Where a verdict finds that the grantor was induced by fraud to execute a deed, the trial judge should permit the complaint to be so amended as to conform to the verdict, as on the allegations and verdict the equity of the grantor was one for reformation and not for cancellation, though the action was brought for cancellation of the deed. *Gillis v. Arringdale*, 295.

Where the complaint alleges and the verdict finds that the consideration in a deed was, by fraud or mistake, less than the amount agreed upon, the judgment should be for the reformation and not the cancellation of the deed. *Gillis v. Arringdale*, 295.

The motion of the plaintiff in *mandamus* proceedings, on the pleadings and admissions of defendant, for a *mandamus*, is in the nature of a demurrer *ore tenus* to the answer, involving the admission of the facts set out therein. *Barnes v. Comrs.*, 27.

Where a demurrer was sustained to a complaint for libel against a newspaper because it failed to appear that notice of the action had been given, the trial court may permit an amendment showing that fact. *Osborn v. Leach*, 628.

In an action against a newspaper for libel the failure of the complaint to allege the five days' notice renders it demurrable. *Osborn v. Leach*, 628.

In an action by the receiver to enforce the double liability imposed on bank stockholders, the complaint should state the time when the several defendants became stockholders and when the debts were contracted. *Smathers v. Bank*, 410.

In an action for a penalty, the statute allowing the same being a public one need not be pleaded. *Currie v. Railroad Co.*, 535.

In an action for a penalty, the complaint alleging the tender on a specified day, and that the defendant on the two following days "failed and refused to receive the same," is a sufficient allegation of tender for the last two days. *Currie v. Railroad Co.*, 535.

An injunction will not lie to prevent the removal of timber in the absence of an allegation of insolvency of the defendant. *Kistler v. Weaver*, 388.

PRIVILEGED COMMUNICATION. See "Libel"; "Newspapers."

A statement by a client to his attorney that he had procured a loan of some money to pay a fee in a case settled up is not a privileged communication. *Bekhout v. Cole*, 583.

PROCESS.

Where a summons is improperly made returnable before the judge at chambers, he should not dismiss the action, but transfer it to the civil issue docket. *Martin v. Clark*, 178.

Where a summons is improperly made returnable at chambers, it should not be dismissed, but transferred to the proper docket. *Bank v. Comrs.*, 230; *Jones v. Comrs.*, 218.

Service of process on the state insurance commissioner is valid although the insurance company has not domesticated. *Hinton v. Ins. Co.*, 314.

Where a defendant asks for a *recordari*, he thereby waives a lack of service of summons. *Johnson v. Reformers*, 385.

PROXIMATE CAUSE. See "Contributory Negligence"; "Damages"; "Last Clear Chance"; "Negligence."

In this action for injuries received from a sand-dryer there is evidence sufficient to go to the jury as to the negligence of the defendant, and that this negligence was the proximate cause of the injury. *Walker v. Railroad Co.*, 738.

PUBLIC OFFICERS. See "Officers."

Q

QUESTIONS FOR JURY.

In an action against a railroad company for wrongfully causing the death of an engineer, the question whether it and another road were partners in operating the part of the road on which the deceased was killed was properly submitted to the jury. *Harrill v. Railroad Co.*, 601.

Whether the consideration for a note transferred by a husband to his wife was adequate, was a question of fact for the jury and could not be considered on appeal. *Trust Co. v. Benbow*, 303.

In an action for libel against a newspaper, the paper having pleaded a retraction of the publication, it is necessary for the defendant to show that the publication was made in good faith, and with reasonable ground to believe it to be true, in order to relieve the paper from punitive damages. *Osborn v. Leach*, 628.

QUIETING TITLE. See "Ejectment."

Before an order allowing a person to cut timber can be made in an action to quiet title, the court must find as a fact and incorporate it in the order that the party allowed to cut the timber claims the land in good faith and has a *prima facie* title thereto, and that the claim of the adverse party is not made in good faith. *Johnson v. Duvall*, 642.

QUIETING TITLE—*Continued.*

Where the taxes, interests and costs for which land was sold were paid by the tax debtor during the year allowed for redemption, the tax deed, valid on its face, constituted a cloud on the title. *Beck v. Meroney*, 532.

In an action to set aside a tax deed as a cloud on title, it was not necessary that the complaint allege that all the taxes had been paid, provided evidence of that fact was introduced at the trial. *Beck v. Meroney*, 532.

QUO WARRANTO.

An act allowing the prosecution of an action in the name of the state to assert the right of a citizen to a public office is not for that reason unconstitutional. *McCall v. Webb*, 356.

The failure of plaintiff to recover fees and salary in the action adjudging his right to an office is a bar to a new and independent action for fees and salary. *McCall v. Webb*, 356.

R

RAILROADS. See "Assumption of Risk"; "Carriers"; "Last Clear Chance"; "Negligence"; "Contributory Negligence."

In this action for injuries received from a sand-dryer there is evidence sufficient to go to the jury as to the negligence of the defendant, and that this negligence was the proximate cause of the injury. *Walker v. Railroad Co.*, 738.

A railroad company has a right to change the grade of its roadbed or to remove it to any point on its right-of-way. *Brinkley v. Railroad Co.*, 654.

The Code, sec. 1996, does not authorize the county commissioners to issue bonds in aid of the "construction" of a railroad not yet begun. *Graves v. Comrs.*, 49.

The county commissioners are not authorized to issue bonds on the credit of a township for the construction of a railroad. *Graves v. Comrs.*, 49.

One walking or sitting or lying down on a railroad track is guilty of contributory negligence. *Carter v. Railroad Co.*, 498.

Where the recitals in railroad bonds are that they were issued under a particular act of the legislature, the burden of validating them as made under sec. 1996 of The Code is on the party alleging their validity. *Graves v. Comrs.*, 49.

A railroad corporation operating a road jointly with another corporation is responsible for injury to its employees, as a natural

RAILROADS—*Continued.*

person would be for the liabilities of a firm of which he is a member. *Harrill v. Railroad Co.*, 601.

In an action against a railroad company for wrongfully causing the death of an engineer, the question whether it and another road were partners in operating the part of the road on which the deceased was killed was properly submitted to the jury. *Harrill v. Railroad Co.*, 601.

The fellow-servant law applies to all railroad employees, whether injured while running trains or rendering any other service. *Sigman v. Railroad Co.*, 181.

A railroad company may make a change in a county road that does not necessarily impair its usefulness. *Brinkley v. Railroad Co.*, 654.

A tax payer may enjoin county commissioners from making a tax levy to pay interest on railroad bonds issued under an unconstitutional statute, without restoring to the *bona fide* holders of the bonds the consideration paid therefor. *Graves v. Comrs.*, 49.

Under the act depriving railroad companies of the defense of assumption of risk, a railroad company cannot plead such defense to an action by an employee for injuries from a defective sand-dryer. *Walker v. Railroad Co.*, 738.

RECEIVERS.

A receiver for an insolvent bank is the proper party to bring an action against the stockholders to enforce their double liability. *Smathers v. Bank*, 410.

The better practice to enforce the double liability imposed on bank stockholders is to obtain the desired relief in a creditors' bill, where such has been brought, instead of an independent action by the receiver. *Smathers v. Bank*, 410.

RECORDARI.

Where a *recordari* is ordered as a substitute for an appeal, but is not docketed, the appellee has a right to docket the case and have it dismissed at any succeeding term of the court. *Johnson v. Reformers*, 385.

Where a firm agrees to sell goods for a part of the profits, it is not a conditional sale and need not be registered. *Lance v. Butler*, 419.

REFORMATION OF INSTRUMENTS. See "Cancellation of Instruments."

The evidence of a statement by a grantor to a grantee at the time of the delivery of a deed that it should be void if the grantee did not support the grantor, is not sufficient evidence to show that this condition was omitted from the deed by mistake. *Helms v. Helms*, 164.

In an action for the reformation of a deed as to the consideration, the value of the land and what the grantor would have sold it for at the time of the execution of the deed is competent in corroboration of the evidence of the grantor as to the consideration. *Gillis v. Arringdale*, 295.

Where the complaint alleges and the verdict finds that the consideration in a deed was, by fraud or mistake, less than the amount agreed upon, the judgment should be for the reformation and not the cancellation of the deed. *Gillis v. Arringdale*, 295.

In an action for the reformation of a deed as to the consideration the grantor is not bound to accept a proposition to compromise not in accordance with his claim. *Gillis v. Arringdale*, 295.

In an action for the reformation of a deed, one of the plaintiffs could not compel the defendant to take a share of the premises acquired by foreclosure at the price expressed in the deed. *Gillis v. Arringdale*, 295.

In an action to reform a deed, if defendant elects to take a certain share of the premises he would be required to pay one of the plaintiffs, who claimed such share through title paramount to the defendant's, at a price based on the consideration expressed after reformation. *Gillis v. Arringdale*, 295.

Where a verdict finds that the grantor was induced by fraud to execute a deed, the trial judge should permit the complaint to be so amended as to conform to the verdict, as on the allegations and verdict the equity of the grantor was one for reformation and not for cancellation, though the action was brought for cancellation of the deed. *Gillis v. Arringdale*, 295.

REMEDIES.

The general assembly may abolish remedies and substitute new ones, or even without substituting any, if a reasonable remedy still remains. *McCall v. Webb*, 350.

REMOVAL OF CAUSES. See "Federal Courts."

The petition in this case for removal to the federal court on account of diversity of citizenship and the jurisdictional amount does

REMOVAL OF CAUSES—*Continued.*

not sufficiently allege the amount involved. *Corporation Commission v. Railroad Co.*, 81.

RULES OF SUPREME COURT.

Appeals will be dismissed where no index is sent up in the record and printed, and no marginal references prepared. *Sigman v. Railroad Co.*, 181.

The rule of the supreme court relieving the trial judge of the duty of instructing specially upon the nature of corroborative or impeaching evidence, unless specially requested, does not apply to a case where the trial judge in his charge marshals impeaching evidence along with substantive evidence without calling attention thereto. *Westfeldt v. Adams*, 591.

S

SALARIES AND FEES.

The failure of plaintiff to recover fees and salary in the action adjudging his right to an office is a bar to a new and independent action for fees and salary. *McCall v. Webb*, 356.

SALES.

Where a firm agrees to sell goods for a part of the profits, it is not a conditional sale and need not be registered. *Lance v. Butler*, 419.

Where one who was an agent for another for the sale of goods mixed such goods with his own stock of goods, the title of his principal attached to the whole stock until the value of his goods were returned to him or properly accounted for. *Lance v. Butler*, 419.

In an action for breach of warranty on the sale of an engine for use in a saw-mill plaintiff is entitled to interest on the amount invested in the mill for the time it was idle. *Critcher v. Porter Co.*, 542.

In an action for breach of warranty on the sale of an engine for use in a saw-mill, under a warranty that it will develop a certain horse-power, or that defendant will make it do so, the plaintiff is entitled to recover expenses incurred in running the mill at the request of the defendant. *Critcher v. Porter Co.*, 542.

In a foreclosure proceeding, in which all persons having an interest in the property were made parties, it was proper to move for a decree of sale under a judgment lien under which the prop-

SALES—*Continued.*

erty might have been sold without such decree. *Fidelity Asso. v. Lash*, 405.

Where machinery fails to come up to the warranty thereof, the buyer may refuse to keep it, and recover for the amount paid thereon, together with such damages as he sustained and which were in contemplation of the parties. *Critcher v. Porter Co.*, 542.

The license tax imposed on every itinerant person peddling ranges is a violation of the constitution of the United States to the extent of sales by sample of goods manufactured in another state, shipped into this state and delivered in their original packages. *Range Co. v. Campen*, 506.

In an action for breach of warranty as to saw-mill machinery the purchaser cannot recover for loss of profits on lumber contracted to be sold, if the contract was not known to the seller. *Critcher v. Porter Co.*, 542.

In the absence of special circumstances, the measure of damages for breach of warranty as to the quality or capacity of machinery sold is the difference between the contract price and the actual value, with special damages which were in contemplation of the parties. *Critcher v. Porter Co.*, 542.

In an action for breach of warranty on the sale of an engine for use in a saw-mill, under a warranty that it will develop a certain horse-power, or that defendant will make it do so, the plaintiff is entitled to recover expenses incurred in running the mill at the request of the defendant. *Critcher v. Porter Co.*, 542.

SCHOOLS.

An act done by a teacher in the exercise of his authority, and not prompted by malice, is not actionable, though it may cause permanent injury, unless a person of ordinary prudence could reasonably have foreseen that a permanent injury would naturally or probably result from the act. *Drum v. Miller*, 204.

In an action against a teacher for injuries to a pupil, caused by the teacher throwing a pencil at the pupil, which permanently injured his eye, an instruction that unless the jury found that a reasonably prudent man might reasonably or in the exercise of ordinary care have expected that the injury complained of would result from his act in throwing the pencil, defendant should be found not liable, was erroneous. *Drum v. Miller*, 204.

SEALS.

A commissioner of deeds for this state, residing in another state, is not required to affix his seal to the certificate acknowledging the execution of a deed conveying land in this state. *Johnson v. Duvall*, 642.

SPECIFIC PERFORMANCE.

In an action by a vendee for specific performance, evidence of the defendant vendor as to who was living on land claimed by a prior purchaser from him under an oral contract at the time of the execution of plaintiff's contract is admissible on the issue raised by defendant of a mutual mistake in the latter contract in including such land. *Kelly v. Johnson*, 650.

One who occupies land under a parol contract of purchase and who has made valuable improvements thereon, is entitled, on interpleading in a suit by a subsequent purchaser for specific performance, to the value of his improvements, to be deducted from the balance of the purchase-money due from plaintiff, who, under his contract, is entitled to a deed with full covenants of warranty. *Kelly v. Johnson*, 647.

In a suit by a vendee for specific performance, defended on the ground that certain land was included in the contract by mistake, an issue tendered by defendant which omits to direct inquiry to the mutuality of the mistake is properly rejected. *Kelly v. Johnson*, 650.

STATUTES. See "The Code"; "Acts."

The journals of the general assembly are conclusive evidence as to the passage of an act and cannot be contradicted by entries made on an original bill. *Comrs. v. Packing Co.*, 62.

The burden of proving that a statute was not passed in accordance with the constitution is on the person alleging its invalidity. *Comrs. v. Packing Co.*, 62.

The general assembly may abolish remedies and substitute new ones, or even without substituting any, if a reasonable remedy still remains. *McCall v. Webb*, 356.

Prior to November 1, 1886, it had not been decided that an act ratified by the presiding officers of the general assembly was conclusive evidence that the same had been passed in accordance with the constitution. *Graves v. Comrs.*, 49.

In an action for a penalty, the statute allowing the same being a public one need not be pleaded. *Currie v. Railroad Co.*, 535.

STOCKHOLDERS. See "Corporations."

In an action by the receiver to enforce the double liability imposed on bank stockholders, the complaint should state the time when the several defendants became stockholders and when the debts were contracted. *Smathers v. Bank*, 410.

A receiver for an insolvent bank is the proper party to bring an action aginst the stockholders to enforce their double liability. *Smathers v. Bank*, 410.

While there is no necessity for joining creditors of a bank as parties plaintiff in a suit brought by the receiver to enforce the stockholders' double liability, such joinder is not prejudicial to the defendant. *Smathers v. Bank*, 410.

Where a surviving partner of a firm, who was personally liable on an endorsement of a note in the firm name without authority, organized a corporation and transferred the assets of the firm to such corporation in payment of his subscription to the corporation's stock, without intent to defraud his creditors, the corporation was not liable for such debt. *Bank v. Hollingsworth*, 556.

Acts 1897, ch. 298, imposing on stockholders in banks a double liability, does not fix such liability for debts contracted prior to the enactment of the statute, but does apply to stockholders of banks organized before the passage of the act. *Smathers v. Bank*, 410.

STREETS.

An alley is not necessarily a street and the public have not necessarily a right to its use. *Milliken v. Denny*, 19.

SUBROGATION.

Where the grantee in a deed agrees, as a part of the consideration, to support the grantor, which he fails to do, and the grantor executes another deed to a third person, the second grantee is not subrogated to the rights of the grantor to enforce her claim for support. *Helms v. Helms*, 164.

SUMMONS. See "Process."

SUPERIOR COURTS.

An action against a surety on an attachment bond in the penal sum of $200, being *ex contractu*, must be brought before a justice of the peace. *Railroad Co. v. Hardware Co.*, 73.

SUPREME COURT.

The supreme court, on a second appeal, is not precluded under the doctrine of the law of the case from passing on a question not determined on the first appeal. *Vann v. Edwards*, 661.

SURETYSHIP.

An action by the ward against the sureties on the bond of the guardian is barred after three years from the time the ward becomes twenty-one years old if the guardian makes no final settlement; and within six years if the guardian makes a final settlement. *Self v. Shugart*, 185.

T

TAXATION.

A tax payer may enjoin county commissioners from making a tax levy to pay interest on railroad bonds issued under an unconstitutional statute, without restoring to the *bona fide* holders of the bonds the consideration paid therefor. *Graves v. Commissioners*, 49.

An act levying a tax upon all clams and oysters shipped out of a county is constitutional. *Brooks v. Tripp*, 159.

Acts 1901, ch. 91, levying an annual franchise tax on corporations is lawful and applies to foreign corporations doing business in this state. *Comrs. v. Packing Co.*, 62.

Acts 1903, ch. 251, provides a plain and adequate remedy at law to test the validity and regularity of a tax assessment, and it cannot be tested by an injunction. *Wilson v. Green*, 343.

In an action to set aside a tax deed as a cloud on title, it was not necessary that the complaint allege that all the taxes had been paid, provided evidence of that fact was introduced at the trial. *Beck v. Meroney*, 532.

Under the charter of the city of Winston, dealers in trading stamps do not come within the provision of an ordinance taxing "gift enterprises." *Winston v. Beeson*, 271; *Winston v. Hudson*, 286.

TAX TITLES.

Where the owner of land pays the sheriff the taxes, costs and interest on land sold for taxes, and the sheriff tenders the money to the purchaser, it is sufficient, though the payment was made to the sheriff by check. *Beck v. Meroney*, 532.

An action to set aside a tax deed as a cloud on title is not barred within three years from the sale. *Beck v. Meroney*, 532.

In an action to set aside a tax deed as a cloud on title, it was not necessary that the complaint allege that all the taxes had been paid, provided evidence of that fact was introduced at the trial. *Beck v. Meroney*, 532.

Where a tax debtor paid the amount demanded by the sheriff to redeem the land from tax sale, such payment constituted a

TAX TITLES—*Continued.*

redemption though the sheriff erroneously computed the amount due. *Beck v. Meroney*, 532.

Where the taxes, interest and costs for which land was sold were paid by the tax debtor during the year allowed for redemption, the tax deed, valid on its face, constituted a cloud on the title. *Beck v. Meroney*, 532.

TELEGRAPHS. See "Damages."

In an action against a telegraph company for damages for failure to deliver a message announcing the death of a second cousin, it is not necessary to disclose to the company the relationship between the sender and the sendee, when it relates to sickness or death. *Hunter v. Telegraph Co.*, 458.

In an action against a telegraph company, a person is entitled to recover damages for mental anguish for failure to deliver a message announcing the death of a second cousin. *Hunter v. Telegraph Co.*, 458.

In an action against a telegraph company to recover damages for failure to deliver a message announcing the death of a person, the plaintiff cannot recover his expenses in going to the deceased. *Hunter v. Telegraph Co.*, 458.

The proper second issue in an action for damages on the question of mental anguish is: "What damage, if any, has the plaintiff sustained on account of mental anguish caused by such negligence?" *Hunter v. Telegraph Co.*, 458.

Proof or admission that a telegraph company received a message for transmission, and failed to deliver it to the sendee within a reasonable time, makes a *prima facie* case of negligence, and imposes on the company the burden of alleging and proving such facts as it may rely on in excuse. *Cogdell v. Telegraph Co.*, 431.

Where a telegraph company failed to make any attempt to deliver a message because the sendee lived beyond the free delivery limits, and also failed to notify the sender of additional charges for such delivery, or of refusal to deliver it at all, the company is liable for damages resulting from its negligence in failing to make the delivery. *Hood v. Telegraph Co.*, 622.

The failure to notify a sender of a telegram of the non-delivery thereof is evidence of negligence. *Cogdell v. Telegraph Co.*, 431.

The misspelling of the name of the sendee of a telegram does not relieve the telegraph company from the burden of showing that

TELEGRAPHS—*Continued.*

it could not have delivered the message with the exercise of reasonable diligence. *Cogdell v. Telegraph Co.*, 431.

A person cannot recover damages for mental anguish by reason of a telegraph company delaying the delivery of a message relating to business, though mental anguish was suffered by the sender occasioned by the misapprehension as to the meaning of the message. *Bowers v. Telegraph Co.*, 504.

TENANCY IN COMMON.

Parties claiming rights in property by virtue of a judgment should set up the entire record in the suit in which the judgment was rendered. *Allred v. Smith*, 443.

TENDER.

In an action for a penalty, the complaint alleging a tender on a specified day, and that the defendant on the two following days "failed and refused to receive the same," is a sufficient allegation of tender for the last two days. *Currie v. Telegraph Co.*, 535.

THE CODE. See "Acts"; "Statutes."

Sec. 154. Guardian and Ward. *Self v. Shugart*, 185.
Sec. 155. Guardian and Ward. *Self v. Shugart*, 185.
Sec. 163. Guardian and Ward. *Self v. Shugart*, 185.
Sec. 169. Guardian and Ward. *Self v. Shugart*, 185.
Sec. 185. Judgments. *Allred v. Smith*, 443.
Sec. 208. Judgments. *Junge v. MacKnight*, 105.
Sec. 237. Judgments. *Junge v. MacKnight*, 105.
Sec. 240. Pleadings. *Milliken v. Denny*, 19.
Sec. 254. Judgments. *Allred v. Smith*, 443.
Sec. 255. Judgments. *Allred v. Smith*, 443.
Sec. 267. Actions. *Railroad Co. v. Hardware Co.*, 73.
Sec. 272. Actions. *Railroad Co. v. Hardware Co.*, 73.
Sec. 341. Quo Warranto. *McCall v. Webb*, 356.
Sec. 385. Judgments. *Junge v. MacKnight*, 105.
Sec. 386. Judgments. *Junge v. MacKnight*, 105.
Sec. 390. Judgments. *Junge v. MacKnight*, 105.
Sec. 426. Deeds. *Allred v. Smith*, 455.
Sec. 428. Deeds. *Allred v. Smith*, 455.
Sec. 525. Libel. *Osborn v. Leach*, 628.
Sec. 530. Conversion. *Lance v. Butler*, 419.
Sec. 550. Appeal. *Sigman v. Railroad Co.*, 181.
Sec. 567. Actions. *Bank v. Comrs.*, 230.
Sec. 613. Quo Warranto. *McCall v. Webb*, 356.

THE CODE—*Continued.*

Sec. 616. Quo Warranto. *McCall v. Webb*, 356.
Sec. 623. Intoxicating Liquors. *Barnes v. Comrs.*, 27.
Sec. 668. Banks and Banking. *Smathers v. Bank*, 410.
Sec. 707. Railroads. *Graves v. Comrs.*, 49.
Sec. 1215. Contempt. *In re Briggs*, 118.
Sec. 1275. Sales. *Lance v. Butler*, 419.
Sec. 1281. Descent and Distribution. *Weeks v. Quinn*, 425.
Sec. 1358. Depositions. *Womack v. Gross*, 378.
Sec. 1360. Depositions. *Womack v. Gross*, 378.
Sec. 1361. Depositions. *Womack v. Gross*, 378.
Sec. 1370. Costs. *Sitton v. Lumber Co.*, 540.
Sec. 1399. Executors and Administrators. *Bean v. Bean*, 92.
Sec. 1400. Executors and Administrators. *Bean v. Bean*, 92.
Sec. 1402. Executors and Administrators. *Bean v. Bean*, 92.
Sec. 1402. Guardian and Ward. *Self v. Shugart*, 185.
Sec. 1488. Guardian and Ward. *Self v. Shugart*, 185.
Sec. 1510. Guardian and Ward. *Self v. Shugart*, 185.
Sec. 1525. Guardian and Ward. *Self v. Shugart*, 185.
Sec. 1577. Guardian and Ward. *Self v. Shugart*, 185.
Sec. 1580. Guardian and Ward. *Self v. Shugart*, 185.
Sec. 1617. Guardian and Ward. *Self v. Shugart*, 185.
Sec. 1619. Guardian and Ward. *Self v. Shugart*, 185.
Sec. 1826. Married Women. *Vann v. Edwards*, 661.
Sec. 1859. Judgments. *Candler v. Electric Co.*, 12.
Sec. 1899. Banks and Banking. *Smathers v. Bank*, 410.
Sec. 1901. Taxation. *Wilson v. Green*, 353.
Sec. 1901-557. Libel. *Osborn v. Leach*, 628.
Sec. 1957. Railroads. *Brinkley v. Railroad Co.*, 654.
Sec. 1962. Railroads. *McGraw v. Railroad Co.*, 269.
Sec. 1963. Railroads. *McGraw v. Railroad Co.*, 269.
Sec. 1964. Penalties. *Currie v. Railroad*, 535.
Sec. 1996. Bonds. *Graves v. Comrs.*, 49.
Sec. 2141. Wills. *Brown v. Hamilton*, 10.
Sec. 2522. Swamp Lands. *Lumber Co. v. Lumber Co.*, 742.
Sec. 2527. Nuisances. *Reyburn v. Sawyer*, 335.
Sec. 2867. Statutes. *Comrs. v. Packing Co.*, 62.
Sec. 3800. Ordinances. *Winston v. Beeson*, 271.
Sec. 3800. Ordinances. *Plymouth v. Cooper*, 1.
Sec. 3822. Taxation. *Wilson v. Green*, 343.
Sec. 3823. Taxation. *Wilson v. Green*, 353.
Sec. 3835. Guardian and Ward. *Fisher v. Brown*, 198.

TOWNS. See "Municipal Corporations."

TRESPASS.

In an action for trespass on lands counsel agreed that if the jury should answer the first issue as to title "yes" then it was admitted that defendant had trespassed and that the amount of damages should be ascertained under The Code. The first issue was whether plaintiff was the owner of the lands described in the complaint or any part thereof. The second was, "If so, what part?" It was not error to submit a third issue as to whether defendant had trespassed on lands described in the complaint, and which were inside a certain grant to plaintiff, where it appeared to the court that the evidence raised a question as to whether defendant might not have trespassed on lands described in the complaint, but which it might be found were not within the grant and did not belong to plaintiff. *Lumber Co. v. Lumber Co.*, 744.

Where, in an action for trespass on lands, the jury found that plaintiff owned a portion of the lands described in the complaint, but that the defendant had not trespassed on that portion, it was error to include in the judgment a decision that the title to such portion was in plaintiff. *Lumber Co. v. Lumber Co.*, 742.

TRIAL. See "Costs"; "Witnesses"; "Instructions."

TRUSTS.

The proceeds of sales made by an agent are a trust fund in the hands of the agent, except as to his commissions for selling. *Lance v. Butler*, 419.

U

UNDUE INFLUENCE.

In proceedings to probate a will, an instruction that if the devisees "influenced" the testator the finding should be for the caveators, is not ground for a new trial, in view of the entire charge of the court herein. *Westbrook v. Wilson*, 400.

V

VENDOR AND PURCHASER.

In an action by a vendee for specific performance, evidence of the defendant vendor as to who was living on land claimed by a prior purchaser from him under an oral contract at the time of the execution of plaintiff's contract is admissible on the issue raised by defendant of a mutual mistake in the latter contract in including such land. *Kelly v. Johnson*, 650.

In a suit by a vendee for specific performance, defended on the

VENDOR AND PURCHASER—*Continued.*

ground that certain land was included in the contract by mistake, an issue tendered by defendant which omits to direct inquiry to the mutuality of the mistake is properly rejected. *Kelly v. Johnson*, 650.

VENUE.

An objection that the summons was made returnable at chambers instead of at term is waived by failure to move to transfer the case to the proper docket. *Jones v. Comrs*, 218; *Bank v. Comrs.*, 230.

Where a summons is improperly made returnable at chambers, it should not be dismissed, but transferred to the proper docket. *Jones v. Comrs.*, 218; *Bank v. Comrs.*, 230.

VERDICT.

A request to charge that the "plaintff cannot recover" should not be given. *Foy v. Winston.*

Where a verdict is set aside for a supposed error of law, an appeal lies therefrom. *Johnson v. Reformers*, 385.

VESTED INTERESTS.

An act providing that the owner of swamp lands failing to pay certain taxes shall forfeit the land to the state board of education is not constitutional. *Lumber Co. v. Lumber Co.*, 742.

W

WAIVER.

An objection that the summons was made returnable at chambers instead of at term is waived by failure to move to transfer the case to the proper docket. *Jones v. Comrs.*, 218; *Bank v. Comrs.*, 230.

Where a plaintiff introduced in evidence the entire record in supplementary procedings, it thereby waived its exception to the previous exclusion of parts of such record objected to as being fragmentary. *Trust Co. v. Benbow*, 303.

Where a defendant asks for a *recordari*, he thereby waives a lack of service of summons. *Johnson v. Reformers*, 385.

WARRANTY.

In an action for breach of warranty as to saw-mill machinery the purchaser cannot recover for loss of profits on lumber contracted to be sold, if the contract was not known to the seller. *Critcher v. Porter Co.*, 542.

WARRANTY—*Continued.*

In the absence of special circumstances, the measure of damages for breach of warranty as to the quality or capacity of machinery sold is the difference between the contract price and the actual value, with special damages which were in contemplation of the parties. *Critcher v. Porter Co.*, 542.

In an action for breach of warranty on the sale of an engine for use in a saw-mill, under warranty that it will develop a certain horse-power, or that defendant will make it do so, the plaintiff is entitled to recover expenses incurred in running the mill at the request of the defendant. *Critcher v. Porter Co.*, 542.

Where machinery fails to come up to the warranty thereof, the buyer may refuse to keep it, and recover for the amount paid thereon, together with such damages as he sustained and which were in contemplation of the parties. *Critcher v. Porter Co.*, 542.

In an action for breach of warranty on the sale of an engine for use in a saw-mill plaintiff is entitled to interest on the amount invested in the mill for the time it was idle. *Critcher v. Porter Co.*, 542.

WATER COMPANIES.

Under a contract with a water company to supply water for extinguishing fires, requiring that it shall provide pressure on four minutes' notice to throw ten streams at a certain height, a property owner, suing for damages for failure to furnish water for the extinguishment of a fire, need not show that notice was given the company, as such provision was for an extraordinary pressure to show the capacity of the plant. *Jones v. Water Co.*, 553.

Where a water company contracts with a town to furnish water at a certain pressure for the purpose of extinguishing fires, a citizen injured by a failure of the company to furnish the water as contracted may recover in his own name for the injury. *Jones v. Water Co.*, 553.

WATERS AND WATER-COURSES.

In an action for damages caused by a dam across a stream, it is not competent to show the effect of the increased benefit of the water on the lands of adjoining owners. *Chaffin v. Mfg. Co.*, 95.

In an action for damages by a dam across a stream, it is competent to show the condition of the banks of the stream above and below the dam in order to show that this condition

WATERS AND WATER-COURSES—*Continued.*

was not caused by the erection of the dam. *Chaffin v. Mfg. Co.*, 95.

In an action for damages caused by a dam across a stream, an instruction that the party alleging damages must prove the same to the satisfaction of the jury, where the trial judge charged that the burden was on him and defined a preponderance of evidence, is not objectionable. *Chaffin v. Mfg. Co.*, 95.

An instruction that to entitle a plaintiff to nominal damages he must show damages capable of being estimated, perceptible, as an appreciable quantity, is erroneous. *Chaffin v. Mfg. Co.*, 95.

WILLS.

Where a testator devised his lands south of a certain line, "containing by estimation two hundred acres," and subsequently he purchased other lands south of the line, the reference to the number of acres did not prevent the latter lands being included in the devise. *Brown v. Hamilton*, 10.

In proceedings to probate a will, an instruction that if the devisees "influenced" the testator the findng should be for the caveators, is not ground for a new trial, in view of the entire charge of the court herein. *Westbrook v. Wilson*, 400.

WITNESSES. See "Corroboration of Witnesses"; "Impeachment of Witnesses."

Though a witness can prove his attendance against the party who subpœnas him, such attendance cannot be taxed as costs against the opposite party in case he loses, unless the witness was examined at the trial or was tendered to such opposite party. *Sitton v. Lumber Co.*, 540.

A statement by a client to his attorney that he had procured a loan of some money to pay a fee in a case settled up is not a privileged communication. *Eekhout v. Cole*, 583.

The Code, sec. 1115, requiring a witness to testify touching any unlawful gaming done by himself or others, is not unconstitutional by reason of the fifth amendment to the constitution of the United States or Art. I, sec. 11, of the constitution of North Carolina, for the reason that the said statute grants a pardon to the witness. *In re Briggs*, 118.

The compensation received by a surveyor of land involved in ejectment is not such a disqualifying interest as to render proof of a declaration by the surveyor as to the boundary incompetent. *Westfeldt v. Adams*, 591.

This book must
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from the building